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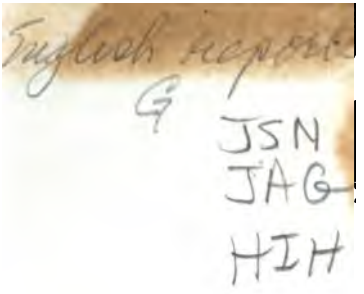
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CASES

IN

Law and Equity:

Argued, Debated and Adjudged in the

King's Bench and Chancery,

IN THE

Twelfth and Thirteenth Years of
Queen ANNE,

During the Time of Lord Chief Justice PARKER.

WITH

TWO TREATISES,

THE ONE

On the Action of Debt,

THE OTHER

On the Constitution of England.

Now first printed from the original Manuscript of the late Lord Chief Baron *GILBERT*.

In the SAVOY:

Printed by CATHERINE LINTOT, Law-Printer to the King's most Excellent Majesty; for W. OWEN, at *Homer's Head*, near *Temple-Bar*, *Fleet-street*. MDCCLX.

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PREFACE.

AS the following Cases were collected by the late Lord Chief Baron GILBERT, it is not doubted but they will meet with a favourable Reception from the Publick, and notwithstanding some of them are extant in *Lucas*, we may venture to say they fall short of the Judgment and

Ability of our Author in their Copiouſneſs and learned Arguments, which Advantage has met with Encouragment preferable to an *Allocatur* in many Inſtances; particularly in the *Caſes Temp. Will.* 8. *Andrews* in the King's Bench, *&c.* and nothing can be a ſtronger Inſtance than that Merit is the beſt *Allocatur*.

The Treatiſe *On the Action of Debt* is a genuine Performance of the ſame Author, and we doubt not will prove, equally acceptable, as likewiſe the ſmall Tract *On the Conſtitution of* England,

England, notwithſtanding Part of an incorrect Copy of it may be met with in Print*.

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* By way of Introduction to this Author's Hiſtory and Practice of the Court of Common Pleas.

A TABLE OF THE NAMES of the CASES.

A.

ABRATHUT *v.* Brandon. *Page* 118
African Company *v.* Maſon. 238
Ainge *v.* Morgan. 124
Anonymous. 95, 103, 131, 238, 287, 316
——— *v.* Cullum. 1
——— *v.* Day. 130

B.

Backhouſe *and* Wells. 20, 129
Barnardiſton *v.* Fouliger. 125
Bellaſis *v.* Mernham. 288
Bromfield *v.* Launder. 143

C.

Calverley *v.* Calverly. *Page* 10, 52
Chancellor and Scholars of Univerſity of *Cambridge v.* Crofts. 248
Chilcot et ux' *v.* Davis. 285
Clavering *and* Alkinſon. 5
Cole *v.* Hawkins. 279
Collins *v.* Harvey. 98
Cripple-Gate, St. Giles's Pariſh, Clerk his Caſe. 180

D.

Danimes *v.* Birch. 298
Devœdel *v.* Toker. 59
Dunsfold Inhabitants *v.* Windſborough Green Inhabitants. 97

E.

Eaſt *and* Effington. 17

F.

Fiſh *v.* Miller. 123
Foreman *and* Doleman. 135
Fothergil *v.* Jackſon. 314

G.

Giles (St.) Cripple-Gate, Parish Clerk his Case. *Page* 180
Gill *v.* Gill. 317
Goodright *v.* Wright. 180

H.

Harrison *v.* Thornborough. 114
Hatch *v.* Bliffet. 308
Haven *v.* Creon. 61
Hempsted Norris Parish Inhabitants *and* Chevely Parish Inhabitants. 104
Hitchcock's Case. 237
Holmes *and* Huse. 62
Howel *and* Gough. 91

I.

—— *and* Amery. 49, 139
Jackson *and* Laverick. 13, 75
Jeffery *and* Barrow. 141, 279
Johnson *v.* Altham. 80, 138
Jones *v.* Givin. 115

K.

Kempster *v.* Nelson. 133
Kinbar *v.* Gardiner. 234

L.

L.

Larkin *and* Turner. Page 53
Leeds (Dux) *v.* Hill-Morton. 130
Lomax *v.* Cullum. 58

M.

Meclanham *v.* Foliam et al'. 9
Miles *v.* Williams. 318
Mohun's Case. 248
Muston *and* Yeatman. 305

N.

Newhall *and* Seabrook. 190
Nutton *and* Crow. 104

P.

Parker *v.* Langley. 168
Physicians College *v.* Doctor Wells. 114
Pockinghall *v.* Hawkins. 210
Pomeroy *v.* Smith. 218
Poulson *and* Franshaw. 101

Q.

Queen, *see* Regina.

R.

Read *v.* Smith. 84
Regina *v.* Aimwell. 308
——— *v.* Allenby et al'. 120

Regina *v.* Bedford. *Page* 297
——— *v.* Blagden. 6, 145
——— *v.* Brathorp Hulfey, Lincolnfhire. 162
——— *v.* Brown. 244
——— *v.* Clark. 291
——— *v.* Cubbold. 111
——— *v.* Dunn. 130
——— *v.* Evans. 160
——— *v.* Freeman. 32
——— *v.* Gapper. 19
——— *v.* Gill. 311
——— *v.* Green. 132, 231
——— *v.* Grey. 244
——— *v.* Gilling. 85
——— *v.* Jones. 13
——— *v.* Joſeland. 289
——— *v.* Kirby. 310
——— *v.* Knott. 296
——— *v.* Langton. 103, 136
——— *v.* Manchefter Pariſh Overſeers. 137
——— *v.* Marthas Pariſh Abbingdon, Surry. 161
——— *v.* Nunn. 36
——— *v.* Odam. 2
——— *v.* Patchin. 277
——— *v.* Pettifer. 67
——— *v.* Peterborough Biſhop. 67
——— *v.* Powell. 4
——— *v.* Randal. 245
——— *v.* Rawlinſon. 241
——— *v.* Robſon. 245
——— *v.* Saffron Walden, Eſſex. 55
——— *v.* Simpſon. 282
——— *v.* Smith. 57
——— *v.* Stafford. 46
——— *v.* Stone. 49

	Page
Regina *v.* Turner.	162
——— *v.* Wagſtaff.	278
——— *v.* Whitechapel Inhabitants.	9, 54
——— *v.* ———	103, 233, 234
Ryder *v.* Brodherſt.	299
S.	
Seſton *v.* Libbard.	77
Sharp, Sir Joſhua, *v.* The Commonalty and Citizens of *London*.	255
Simonds *and* Alexander.	237
Skinner *and* Newton.	61
Smith *v.* Boheme.	93
——— *v.* Cranſhaw.	179
Strafford *v.* Forcer.	311
T.	
——— *v.* Gethin.	91
Turner *v.* Goodwyn.	40
Twaites *v.* Shaw.	246
W.	
Ward *v.* Reynolds.	243
Watkins *v.* Gunter.	312

De

De Termino Sancti Michaelis Anno duodecimo Annæ Reginæ.

Memorandum, *Mr.* J. Littleton Powys *was abſent all this Term, being indiſpoſed with the Gout.*

——— v. *Cullum.*

CASE upon an *Aſſumpſit* againſt an Executrix laid in *London*. Mr. *Powys* moved to change the *Venue* upon Defendant's Affidavit, that her Huſband the Teſtator lived at *Diſſe* in *Norfolk*, that he had not been in *London* in twenty Years before his Death to her Remembrance, and that ſhe verily believed that if there was any ſuch Promiſe, it was made in *Norfolk*. *Venue* changed by Executor.

Regina v. *Odam.*

Order of Baſtardy; Sum in Groſs. Salk. 24. Caſ. of Sett. & Rem. 209. Seſſ. Caſ. 303. Cro. Car. 470. Vent. 336.

UPON the Return of a *Certiorari*, Mr. *Page* took an Exception to an Order of Baſtardy, that the Defendant was ordered to pay 9 *l.* 7 *s.* 6 *d.* in Groſs upon Sight of the Order, beſides a weekly Maintenance for the Child.

Parker Chief Juſtice: The Juſtices may order a Sum in Groſs, for they muſt indemnify the Pariſh, and there may be Charges of the Woman's lying-in, &c. before the reputed Father is found; the Words of the Statute are, that the Juſtices ſhall take Order for the Relief of the Pariſh, and the keeping of the Child, by Payment of Money weekly or other Suſtentations.

Per Cur' Order affirmed.

Pomeroy v. *Smith.*

Poſtea 8. *Prohibitio Purgationis Omiſſo Juramento.*

SERJEANT *Richardſon* prayed a Prohibition to the conſiſtory Court of the Biſhop of *Exeter*; the Plaintiff was libelled there for Incontinence, and a Sentence pronounced that he ſhould purge himſelf (*Omiſſo Juramento*) with four of his Neighbours, within —— Months, or elſe ſtand excommunicated. The Suggeſtion was, that it was contrary to the Common Law, for a Man to be brought to accuſe himſelf in a Court of Juſtice, and that the Statute 13 *Car.* 2. *c.* 12. had taken

taken away the Oath *ex officio*, whereby ſuch Purgation was to be made, and conſequently the Purgation; that it has been ſo taken in the Eccleſiaſtical Courts, and no ſuch Practice had been there ſince that Statute.

Eyre: I don't ſee any Foundation for a Prohibition, for they have certainly Juriſdiction in the Cauſe, and are proceeding in their own Method with which no Common Law interferes, and if they proceed irregularly, you muſt appeal; the Statute 13 *Car.* 2. was only declaratory, for before that Prohibitions were granted as to the Oath *ex officio*.

Parker Chief Juſtice: That Statute has only taken away the Oath, and certainly it cannot be contrary to Law to aſk him whether he be Guilty or not; the granting Prohibitions before that Act was ſomewhat hard, for their Courſe conſidered together and compared with the Rule of Common Law, was really in Favour of the Party accuſed, becauſe that Evidence which in our Courts would be ſufficient to convict him abſolutely, as the Woman's Oath, *&c.* was by their Law only ſufficient to make a probable Charge, ſo as to put it upon the Party to purge himſelf by his Oath, which might give him an Opportunity of vindicating himſelf from a falſe Accuſation.

Adjourned.

Regina v. *Powell.*

Bail upon the Removal of an Indictment for Petty Larceny.

ON a *Certiorari* was returned an Indictment for Petty Larceny againſt the Defendant, who was brought up by *Habeas Corpus*, and arraigned at the Bar, and pleaded Not guilty; and now the Court took into Conſideration what Recognizance of Bail ſhould be taken, and for that Purpoſe two Precedents were cited out of the Crown Office, *viz.*

1. An Indictment of Felony removed by *Certiorari*, the Defendant arraigned and pleaded at the Bar; the Court awarded a *Venire ret' coram Rege proximo Termino*, and bailed him to appear here at the Return Day.

2. An Indictment of Felony removed by *Certiorari*, the Defendant arraigned and pleaded Not guilty at the Bar; the Court awarded a *Venire* returnable ——, and took the Recognizance to appear at the next Gaol Delivery for the proper County.

Upon theſe Authorities the Court awarded a *Venire* returnable *Octab. Hil.* and took the Recognizance to appear at that Day; the Defendant in 100 *l.* and four Manucaptors in 50 *l.* each, and *Corpus pro Corpore*. *Eyre* ſaid he thought that, upon his Appearance next Term, they ought to take a Recognizance for his Appearance at the next Gaol Delivery for the proper County, and if the Juſtices of Gaol Delivery did not give Judgment there, then

then they ſhould bind him by Recognizance to appear here at the Day in Bank, becauſe it being in the Power of the Juſtices of Gaol Delivery to give Judgment below, that may be unneceſſary.

Clavering and *Alkinſon.*

MR. *Wood* moved for a *Superſedeas* to diſcharge the Defendant out of Cuſtody for want of a Declaration within two Terms. *Superſedeas* for not declaring within two Terms.

Upon Affidavit the Caſe was, that the Defendant was in Cuſtody of the Chief Bailiff of the Honor of *Pomfret*, and the Plaintiff had declared againſt him as in Cuſtody of the Sheriff of *Yorkſhire*, and the Inference was, that this could not be taken to be the ſame Perſon, and conſequently no Charge againſt the Defendant. *Sed non allocatur*; *et per Powel* and *Eyre*: A Declaration is delivered which you ſay is wrong, therefore take Advantage of it as you can, but ſurely it is a ſufficient Declaration to hold the Defendant, for the Intent of the Rule is anſwered by it, which is that he ſhould have Notice of the Cauſe of Action againſt him.

Domina Regina v. *Blagden, Portgrev. Burgi de Honiton in Comitatu Devon.*

Information. Rule for Time to plead upon Terms to join Iſſue and take Notice of Trial at the next Aſſizes. 10 Mod. 211, 296. Poſt.

INFORMATION againſt the Defendants to ſhew *Quo warranto* they claim to be Bailiffs of *Honiton*; in Trinity Term a Rule was made, that the Defendants ſhould have Time to plead 'till the laſt Day of the Term, and that the Proſecutor ſhould reply within ſo many Days, and if the Proſecutor offered an Iſſue, then the Defendants ſhould join Iſſue, and take Notice of Trial at next Aſſizes; the Defendants in their Plea ſet forth a long Title, and concluded with a Traverſe, *abſque hoc quod uſurpaverunt modo et forma prout, &c.* To this the Attorney General replied generally, *quod uſurpaverunt modo et forma, et hoc petit quod Inquiratur per patriam*, to which the Defendant demurred in Law; the Proſecutor's Attorney accepted the Demurrer and kept it about a Fortnight, but afterwards returned it, inſiſting that by the Rule they were obliged to join in Iſſue, and demurring was a Breach of it, and therefore ſigned his Judgment.

And now, upon the Defendants Motion to ſet aſide the Judgment for Irregularity, the Queſtion was whether the Demurrer was a Breach of the Rule or not, and the Court agreed that it was not? And that the Defendant was not tied down to join Iſſue in all Events, if the Proſecutor offered him a bad

or

or an immaterial Iſſue, but that in ſuch Caſe he might demur notwithſtanding thoſe Words, and that *ſi offeret exitum* muſt be underſtood of ſuch an Iſſue as was proper to ſome particular Matter in the Plea, and would try the Right; and as to the Iſſue taken in this Caſe upon the general Traverſe of the Uſurpation, which was no more than an Inference from the ſpecial Matter, they ſaid it was the firſt Time it had been offered, and doubted whether it was good, for that it neither denied, nor confeſſed and avoided the Defendants Title, but was only general in Maintenance of the Information, and ſeemed to leave the Proſecutor at large to offer any Thing in Evidence without Regard to the ſpecial Matter of the Defendants Plea.

Parker Chief Juſtice ſeemed to think, that if the Plaintiff had tendered a clear Iſſue, and the Demurrer had been merely frivolous and groundleſs, and only affected Delay, it would have been a Breach of the Rule.

Some Things were offered from the Bar in Defence of the Replication, and (*inter alia*) by Sir *Peter King*, that he who pleads with the Crown, cannot traverſe the Crown's Title without ſhewing one in himſelf, but muſt do both, and the Attorney General may always either take Iſſue on the Defendant's Title, or in general traverſe in Maintenance of the Charge of his Information, except in *Monſtrance de droit*, where the Party confeſſes and avoids the Crown's Title, and ſhews a Title in himſelf conſiſtent with it; he compared this with

the Caſe of an Information for Intruſion, and cited 3 *Rep.* 7. *Co. Ent.* 172, 175. but upon this Matter the Court gave no Opinion.

The Court ruled, that the Judgment ſhould be ſet aſide with Coſts to the Defendant; and Counſel for the Proſecutor prayed to amend their Replication, which was granted alſo upon Payment of Coſts.

Pomeroy v. *Smith.*

Antea 2.

SERJEANT *Richardſon* renewed his Motion for a Prohibition, and cited Caſes to prove that the *Queen*'s Courts would prohibit the Eccleſiaſtical Courts, as well when they proceeded in a Courſe inconſiſtent with the Common Law, as in a Cauſe improper for their Juriſdiction. *Yelv.* 92, 93. 2 *Co.* 44. *Chamberlin* and *Hewſon*, *Moor* 665. 5 *Mod.* 147. *Cro. Jac.* 388. 3 *Cro.* 101. *Sid.* 374. That all Purgation muſt be upon Oath, *vide Lindwood Lib.* 5. *Tit. de Purgatione faciendâ*, and from thence he argued that Statute had taken away the Oath, and conſequently had taken away the Thing which that Oath was the only Means of doing.

Cur': Let them ſhew Cauſe *Quod non fiat prohibitio.*

Meclanham

Meclanham v. *Foliam et al'.*

Prohibition, Suit by Maſter and Mariners againſt Owners and Freighters.

MR. *Whitaker* prayed a Prohibition to the Court of Admiralty, in a Suit brought by the Maſter and Mariners of a Ship for their Wages, wherein Proceſs (in the Nature of a foreign Attachment) was prayed and iſſued againſt the Freighters, to arreſt the Freight due to the Owners in their Hands. *Parker* Chief Juſtice ſaid, that theſe Cauſes were not properly within the Anmiralty Juriſdiction, but had been indulged by the Courts of Common Law for two Reaſons; Firſt, becauſe many could join in the ſame Suit; and Secondly, becauſe they could hold the Ship, the Court granted the Prohibition as to the Maſter (as the Rule is) and denied it as to the Freighters, becauſe it appeared that the Counſel moved for the Owners only, who were not the Parties aggrieved by that Part of the Suit.

Duddletone v. Foliam et al'.

N. B. The Court afterwards granted a Prohibition on the Prayer of Sir John Duddleſtone a Frighter, in whoſe Hands the Freight was arreſted.

Regina v. *Inhabitantes Parochiæ de Whitechapel.*

Order of Vagrancy. Caſ. of Set. & Rem. 73. Poſt.

ON the Return of a *Certiorari*, it was moved to quaſh an Order of two Juſtices for the Removal of two vagrant Children from *Great Dobby* in *Leiceſterſhire*, to *Whitechapel*; the Recital was, that whereas it appeared

peared to them by the Order of *A.* and *B.* Juſtices, *&c.* that *C.* and *D.* Children under the Age of —— Years had been whipt as Vagrants, and ſent to *Great Dobby* as aforeſaid, as the Place of the laſt legal Settlement of the Father, and whereas by Law all Vagrants ought to be ſent to the Place of their Birth, therefore, *&c.*

Rule to ſhew Cauſe *Quod non caſſetur, vide poſt.*

Calverly v. *Calverly.*

Poſtea.
Prohibition.
Suit *v.* Executor, for the Diſtribution of the *Reſiduum*, having a Legacy by the Will.
Vern. 473. pl. 462.
See 2 Vern. 649.
Eq. Abr. 243. (D) pl. 1. and the Note there.
10 Mod. 400.
Will. Rep. 8. 544. to 555.
Ch. Pre. 567.
Gilb. Eq. Rep. 126, 127.
2 Will. Rep. 162.

MR. *Whitaker* prayed a Prohibition to the Arches Court of *Canterbury*, in a Suit againſt an Executor for a Diſtribution of the *Reſiduum* of the Teſtator's Eſtate undiſpoſed of, he having a Legacy by the Will, and the Suggeſtion was, that by the Common Law of *England* the Executor is intitled to the *Reſiduum*. *Powis* Juſtice: After Determination in the Caſe of *Foſter* and *Munts*, it had been received in Chancery, that where the Executor had a Legacy by the Will, Diſtribution ſhould be made of the *Reſiduum*, 'till in the Dutcheſs of *Beaufort*'s Caſe in the Houſe of Peers, ſeveral of the Lords affirmed that the Decree in the Caſe of *Foſter* and *Munts* was founded on a Fraud practiſed by the Executor and the Perſon that made the Will, who perſuaded the Teſtator to leave a great Part of his perſonal Eſtate undiſpoſed of, by aſſuring him that the Law would diſtribute it amongſt his neareſt Relations, and the preſent Lord Chancellor

cellor has determined that there ſhall be no Diſtribution of the *Reſiduum*, but it ſhall go to the Executor at Common Law, where there is nothing more in the Caſe than that the Executor has a Legacy by the Will, and abſolutely renounced that Power in the Court, ſo that this Matter hangs in great Uncertainty at preſent, and is very fit to be ſettled.

Parker Chief Juſtice: If there be ſome Caſes wherein there may be a Diſtribution of this Nature, and others where there may not, and which of theſe is the Caſe in Queſtion, depends upon Fact to be proved, I dont ſee how we can prohibit before that appears.

Per Cur. Rule to ſhew Cauſe.

Haven v. *Creon.*

Attachments for Non-performance of an award.

AN Award was made between the Parties upon a Submiſſion by Obligation made a Rule of Court.

Mod. 21. Salk. 71. pl. 4. 83. pl. 1, 7. Mod. 8. See 9 & 10 W. 3. c. 15. 2 Hawk. P. C. 153. ſect. 37. 2 Keb. 575. 10 Mod. 333. 11 Mod. 170. 12 Mod. 234, 257, 317, 525, 533, 585. Stra. 695. 2 Will. Rep. 450. Barnes 40, &c. 2 Barnes 55, 140.

Mr. *Salkeld*, upon a Rule to ſhew Cauſe why an Attachment ſhould not iſſue for Non-performance, took Exceptions to the Award; Firſt, that it bore Date 28th *Auguſt*, and recited a Bond of Submiſſion dated 7 *Auguſti*, which was a different Bond from that made

made a Rule of Court, which bore Date the 17th of *Auguſt*.

But to this it was anſwered by *Ryves*, and agreed by the Court, that ſince it appeared that the Arbitrators had an Authority before the Award made, unleſs the Defendant proved that there was another Bond agreed with that recited in the Award, they would take this to be a Miſtake only, the rather becauſe it is not neceſſary to recite the Bond at all, and the Award would be good without it, that the Plaintiff might maintain an Action upon it, notwithſtanding that Variance, and wherever a Judgment might be had upon it in an Action they would execute it by Attachment.

Second Exception was, that they had awarded the Defendant to pay all ſuch Coſts as the Maſter ſhould tax, with the ſubſequent Coſts of Taxing the ſaid Coſts, that this was uncertain and might take in Coſts incurred ſince the making of the Award.

To this *Parker* Chief Juſtice ſaid, that the like Anſwer might be given in the Caſe of an Award of a Releaſe of all Actions, *viz.* that it ſhould not be intended that there were any Actions ſince the Award made, and if there were, that the Award ſhould not extend to them, but might be well performed without it; ſo in this Caſe we will not ſuppoſe that the Maſter had taxed any Coſts incurred ſince the Award, but if he has, you may object to them and have them ſtruck off.

Third

Third Exception, that there is a Clauſe for indemnifying ſome Perſons not Parties.

Anſwer that it is recited, that thoſe Perſons were Security for the Plaintiff in the Matters here ſubmitted, and the indemnifying them is for his Benefit, ſince they might have a Remedy againſt him.

Per Cur': *Fiat breve attach'*, unleſs the Defendant perform the Award within a Fortnight.

Domina Regina v. *Jones.*

PER Curiam: We never grant *Certioraries* to remove Judgments from the *Old Baily*, without ſpecial Cauſe. *Certiorari* to the *Old Baily*. *Regula*. Comb. 319.

Jackſon and *Laverack.*

THIS Term this Cauſe was argued a ſecond Time. 10 Mod. 184. 5 Vin. Abr. 27. pl. 43. Poſt.

Mr. *Forteſcue pro Querente in Errore:* The Plaintiff declares, that whereas he was ſeiſed *de Viginti acris Terræ apud, &c. quodque ipſe & omnes illi quorum Statum, &c. a tempore cujus, &c. habuerunt & habere debuerunt eorum Paſtur' in* 140 *acris paſturæ vocatæ Sikehouſe Moor quodque Defendens ſepibus incluſit* 100 *acras terræ Parcellas Communiæ prædictæ ſuæ tam amplo & beneficiali modo, &c.*

The

The Objection is, that the Matter here charged is impoſſible, *Communia Paſturæ* ſignifying the Right only, which is no more capable of being incloſed than a Rent or Advowſon, or Right of Action, *&c.* and the Finding of the Jury will not cure it.

Communia quid.

Communia are a general Term importing only *quid commune*, ſomething which one Man has in common with another *in alieno fundo*; and it varies its Signification as it is applied to different Species. *Fleta*, *Lib.* 4. *c.* 19.

But ſtill all the ſeveral Species to which it is applied are only ſo many Kinds of Rights: Thus *Bracton* defines *Communia paſturæ* to be *Jus paſcendi*, *Communia Eſtoverii* to be *Jus fecandi*, *&c.*

In this Place *Communia* cannot in any Place ſignify the Soil; it has been ſaid indeed that in Statutes and Grants it is uſed in that Senſe; but certainly by a Grant of *Communia Paſturæ* the Soil would not paſs, 12 *H.* 8. 2. 5 *H.* 7. 1. *Cro. Jac.* 575, 579. but ſuppoſing that were otherwiſe, it could not influence this Caſe, for in Statutes and Deeds Words are to be underſtood according to the Senſe of the Parties. But in Pleadings the Judges muſt interpret them according to the ſtrict Notions which the Law has affixed to them and no other.

In Pleadings two Negatives will make an Affirmative according to the ſtrict Rule of Grammar. But in Deeds and Statutes they will

will remain a Negative, if the Intent of the Parties requires it. *Co. Lit.* 146.

In Pleadings disjunctive Particles are always taken ſtrictly, but in Statutes and Deeds they are ſometimes conſtrued in a conjunctive Senſe according to the Intent. *Star* v. *Rokeby*, *Mich.* 9 *Annæ*, *B. R.* and *Paſch.* 11 *Annæ*, *Bradock* and *Wilſon*, A Cuſtom was laid *quod omnes tenentes aut Occupatores* ſhould grind at his Mill, held there that *Tenens* ſignified properly only a Tenant of the Freehold, and therefore the Cuſtom was uncertain.

The Plaintiff himſelf has defined the Senſe of this Word to be the Right, and has uſed it in the Beginning and End of the Declaration, and ſurely the ſame Word muſt be taken in one Senſe throughout the whole Count, and not equivocally. But it cannot ſignify the Soil throughout the whole Count, for then the Action is miſconceived, and ſhould have been Treſpaſs. Lutw. 156.

The Verdict will not aſſiſt the Plaintiff in this Caſe, for Uncertainties in Counts are not helpt by Verdict; and if this had been 100 *acræ Terræ ſive Paſturæ*, it would have been ill; *a fortiori* an Impoſſibily cannot be cured by it, which is the Queſtion here; if that which may be either Right or Wrong cannot be helpt, much leſs can that which is certainly wrong.

Mr. *Lutwych pro Defendente in Errore*: *Communia* may very well be taken, according to ordinary

ordinary Parlance to ſignify the Place after a Verdict, for the Court muſt intend that ſomething was proved in order to found that Verdict, and the Damages given; in common Speech it is good Senſe and very well underſtood, to ſay that he incloſed 100 Acres of the Common.

But if (as they contend) *Communia* muſt ſignify the Right, then it is repugnant to *acras*, and muſt be rejected, and the Sentence will be *incluſit centum acras terræ parcellas paſturæ prædictæ.*

There are a great many Authorities in the Books prove, that where improper Words are uſed which are inconſiſtent with others, they ſhall be rejected.

Chambers and Workhouſe, 3 Lev. 336. *Trover de una amphora ſaporis*; there the Court ſaid, that they could not underſtand what was meant by a Barrel of Taſtes, for that it was impoſſible, and therefore rejected the Word *Sapor*, and intended that the Damages were given for the Barrel. So in the Caſes of Days laid with a *Scilicet* which are impoſſible, the Court always rejected them. *Mich.* 9 *Annæ*, *Blackwell* and *Eals.*

Rol. Abr. 577. Styl. 111. *Transferre negotiationem ſuam*; the Court ſaid it was impoſſible for a Man to transfer his Trade, but after a Verdict they adjudged well upon the Rule, that ſomething muſt have been proved.

Treſpaſs

Treſpaſs *in* 70 *acris Terræ*, the Jury *quoad* 66 *acras* gave —— *Dam'*, *et quoad quinque reſid' Dam'*. The Court rejected the *quinque* and underſtood *quoad reſid'*. Styl. 296.

Mich. 1 Annæ.

Eaſt and *Eſſington*.

THE Caſe of *Rich* and *Moor*, *Mich.* 1706. *C. B.* was Replevin; the Defendant avowed for Diſtreſs of the Cattle of the Plaintiff, (a Stranger) for Damage done to his Common, and did not aver *quod non potuit habere & gaudere in tam amplo*, *&c.* and it was held, that for want of theſe Words he had not a Right to diſtrain, it being the Loſs of his Common which alone could intitle the Commoner.

Mr. *F. S.* Caſes of Uncertainties do not come up to this, *Tenentes aut occupatores terrar'*, when laid by way of Cuſtom or Preſcription, can have no Signification.

In Treſpaſs, if Part can be continued and Part cannot, and a Continuance be laid of the whole, and entire Damages given, the Court will intend no Damages were given for that which was impoſſible. *Sid.* 249. *Hil.* 1 *Annæ*.

Mr. *Forteſcue*: If *Communia* be rejected, there will ſtill remain a Repugnancy, for then it will run thus, 100 *acræ terræ parcellæ Paſturæ prædictæ*, i. e. 100 Acres of arable Land, Parcel of the ſaid Paſture. *Vent.* 260.

In the Caſes cited by Mr. *L.* there was ſomething to make the Declaration good, and then the Court would reject that which made it bad, but this is otherwiſe.

Cro. Jac. 272. 2 *Vent.* 262. Caſes of Uncertainties.

2 *Vent.* 174, 73. Caſes of Impoſſibilities.

There *Hale* Chief Juſtice took a Diverſity upon the Caſes of the *Scilicet*, that if it be a Miſtake in Point of Fact, it ſhall be aided by rejecting it, but if in Point Law it ſhould not, this is a Miſtake in Point of Law.

Parker Chief Juſtice: In *Rich* and *Moor*, the Avowry was for taking the Beaſts *damnum ibid. facientes*, which ſignified the Field only, whereas it ſhould have been *damnum in Communia ſua facientes*, in order to intitle the Commoner to diſtrain.

Eyre Juſtice: Good Authors have taken *Communia* for the Place. *Dufreſne*, in his Gloſſary *verbo Communia*, ſays, it ſometimes ſignifies *ager relictus ad paſcend' communiter per Cives*, and cites for it *Speculum Saxonicum*.

There

There is no Neceſſity for confining the Word to the ſame Senſe throughout the whole Declaration, but muſt be taken *ſecundum ſubjectam materiam* in the Place where it ſtands. *Cro. Jac.* 300. *Hewet* and *Drake*.

F. Powis Juſtice: Tho' *terra* is frequently uſed in Contradiction to *Paſtura*, and ſo ſignifies arable Land, yet Lord *Coke* ſays, that it is *nomen Generaliſſimum*, and comprehends any Soil or Earth whatſoever, as Meadows, Paſtures, &c. and where any Thing is joined to it to particularize it, it ſhall be underſtood of that particular Species, and here is *Paſtura* annexed to it. *Cro. Jac.* 459.

Communia Paſturæ does not ſignify an abſtracted Right, but a Right annexed to Land, and ſo makes a compound Idea.

I do not ſee why it may not be taken as falſe *Latin* intended for *Communis Paſtura*, but the Caſe miſtaken.

Curia adviſare vult.

Regina v. *Gapper*.

MOVED to quaſh an Indictment for receiving ſtolen Goods *Sciens*, &c. But denyed, *Quia per Cur'*: This might have been puniſhed as Felony, and we never quaſh for Offences of ſo high a Nature. Indictment quaſhing.

Backhouſe and *Wells.*

Poſt.
2 Stra. 731.
Forteſc. 133.
8 Mod. 261.
Eq. Caſ. Abr. 184. pl. 27.
10 Mod. 181.
See 8 Vin. Abr. 241. pl. 11.
In the Notes 254. pl. 18. 460. pl. 7.

EJECTMENT; the Jury found a ſpecial Verdict, *viz.* that *Thomas Barker* was ſeiſed in Fee of the Lands in Queſtion, and being ſo ſeiſed made his Will in Writing, *viz.* "And as for my worldly Eſtate, to the "Intent that all my Lands being purchaſed "by myſelf, may go in my Name and Blood, "ſo long as it ſhall pleaſe God to continue it, "I deviſe to my Kinſman *John Barker* all my "Lands in *Longborough*, to hold to him for "the Term of his natural Life only, without "Impeachment of Waſte; and from and after "his Deceaſe to the Iſſue Male of his Body, "(if God ſhall help him with Iſſue) and to the "Heirs Male of ſuch Iſſue Male, and in De"fault thereof to *John Bracy* the Leſſor of the "Plaintiff, and the Heirs Males of his Body. "*Item*, I deviſe to *Thomas Barker* an Attorney, "my Lands in *Emlod*, to hold to him for the "Term of his Natural Life without Impeach"ment of Waſte; and from and after his De"ceaſe to the Heirs Males of his Body." They find that the Lands, mentioned in the Will to be given to *John Barker*, are the ſame with the Lands in the Declaration; that the Deviſor died ſeiſed, and that *John Barker* entered and ſuffered a Common Recovery to the Uſe of him and his Heirs; that *John Barker* died ſeiſed *prout*, *&c.* without having any Iſſue at the Time of making the Will or any Time afterwards, and the Defendant entered and was ſeiſed *prout*, *&c.* That the Plaintiff's

Plaintiff's Leſſor entered upon him, and made Leaſe to the Plaintiff, who entered and was poſſeſſed *quoſque*, *&c. et utrum ſuper tota materia*, *&c.*

In Trinity Term this Cauſe was argued by Mr. *Fazakerly* for the Plaintiff, and Mr. *Jefferies* for the Defendant, and now came on for a ſecond Argument.

Mr. *Lutwyche* for the Plaintiff: The general Queſtion is, whether upon the Conſtruction of this Will *John Barker* was Tenant in Tail of the Lands in Queſtion, or Tenant for Life only; I ſhall Endeavour to prove that he was Tenant for Life only, and conſequently the Recovery void; by conſidering,

Firſt, whether it was not the certain Intent of the Deviſor to make but Tenant for Life only.

Secondly, Whether he hasn ot expreſſed that Intent in ſuch Manner, as agrees with the Rules of Law.

Firſt, As to the Intent, that plainly appears from the Words which create the Eſtate, and ſeveral other Parts of the Will; he firſt of all expreſly declares his Deſign, that the Eſtate ſhould go in this Name and Blood, but he has given it to no other Perſon of his Name but *John Barker*, who is to be the firſt Taker, and it is not likely that he intended to put it into his Power to bar the Eſtate Tail, and unravel the whole at once;

then in the *Habendum* the proper Place to limit his Eſtate, he ſays, to hold to him for the Term of his natural Life only, which laſt is a Word of Reſtriction, and added to take away all poſſible Imagination, that he had made him Tenant in Tail, and after that he ſubjoins the Clauſe, without Impeachment of Waſte, which would have been an uſeleſs and idle Expreſſion without Effect, if he had given him an Eſtate Tail.

2 Lev. 58. Vent. 225.

It is true, in the Caſe of *King* and *Melling*, 2 *Lev.* 58. and *Vent.* 225. there was an expreſs Power given to make a Jointure, and yet the Court adjudged it an Eſtate Tail; but there that Power was uſeleſs and idle, ſince it enabled the Deviſee to make a Jointure without the Charge and Trouble of ſuffering a Recovery.

By the Words, "if God ſhall hereafter bleſs "him with ſuch Iſſue" it appears that he meant a contingent Remainder, and afterwards he adds Words of Limitation to the Heirs Male of ſuch Iſſue, from whence it is plain that he intended Iſſue as a Name of Purchaſe and not of Limitation.

This Intention is the clearer from the Form of Expreſſion in other Places, where he uſes the proper Words to limit an Eſtate Tail, ſo that it is plain he diſtinguiſhed right, and uſed the proper Phraſes according to his Intention.

Secondly,

Secondly, This Deviſe of an Eſtate for Life is agreeable to the Rules of Law; ſuppoſe theſe Words ſtood in a Deed, they would paſs an Eſtate for Life, with a Remainder to the Iſſue in Tail, for there is a great Difference here, Land is given to *T. B.* for Life with Remainder to the Heirs of his Body, for that muſt be an Eſtate Tail by Reaſon of the Word *Heirs*, being a Word of Limitation of an Eſtate according to the reaſoning in *Shelly's* Caſe, and where the Words Iſſue of his Body are uſed for Iſſue, it does not import a Limitation, but is a good Name of Purchaſe. *Shelly's* Caſe.

If this be ſo in a Deed according to the ſtricteſt Rules of Law, why ſhould it be conſtrued otherwiſe in a Will? If it appear to be his Intention to give an Eſtate for Life, and he has uſed proper Words, what can alter it? For there is nothing but the Intention that can give theſe Words the Senſe of an Eſtate Tail. 6 *Rep. Wild's* Caſe.

If a Deviſe be to a Man and his Children and he has none, it is agreeable to the Intent, that it ſhould be an Eſtate Tail, becauſe otherwiſe the Words could not be ſatisfied, for they could not take by Remainder, the Limitation being *in præſenti*. 6 Rep.

The Caſe of *King* and *Melling* is that upon which the other Side depends, but this is very different.

There was a Deviſe to his Son *B.* for his natural Life, and afterwards to the Iſſue of

his Body to be begotten on a ſecond Wife, provided that he ſhould have a Power to make a Jointure on ſuch Wife; this was adjudged an Eſtate for Life in this Court, by the Opinion of ——— and *Rainsford*, againſt my Lord *Hale*, but was reverſed in the Exchequer Chamber, and adjudged an Eſtate Tail.

It is to be obſerved, that in that Deviſe there is no Clauſe to make it diſpuniſhable of Waſte, and as to the Power to make a Jointure, *Hale* anſwers that as before, and alſo diſtinguiſhes that Caſe from *Archer*'s Caſe, 1 Rep. 1 *Rep.* and in Juſtice *Ventris's Report* 231. *Hale* cites a Caſe from *Roll. Abr.* 837. which is a Deviſe to the Eldeſt Son for Life, *& non aliter*, and to the Sons of his Body, and he allows that to be but an Eſtate for Life by Reaſon of the *non aliter*, to which the Word *only* in this Caſe is equivalent.

But by the Difficulty the Caſe of *King* and *Melling* met with among the Judges, it appears they carried the Matter as far as they could; but if this were to be adjudged the ſame Way, it would go a great deal further.

It is very material in this Caſe, that it appears by the different Parts of the Will, that the Deviſor had diſtinguiſhed between Words of Limitation and Purchaſe, and has uſed 3 Lev. 432. Heirs Males where he intends a Tail. 3 *Lev.* 432. *Loddington* and *Kime* was adjudged an Eſtate for Life, becauſe of the Words without Impeachment of Waſte and Iſſue Male.

The

The Caſe of *Taylor* and *Sayer*, cited in *Vent.* 229. is not Law, and it is denied ſo to be in *Raym.* 82. and *Pollexf.* 106.

Mr. *Lechmere pro* Defendant: By the Words of this Deviſe, an Eſtate Tail paſſes to the firſt Deviſee, and there is no ſubſtantial Difference between this Caſe and that of *King* and *Melling*.

I admit (as Mr. *Lutwych* has inſiſted) that if the Deviſor has uſed ſuch Words, as by a proper and determinate Notion will ſignify an Eſtate for Life in a Will, and his Intention appears conformable thereto, it will be the greateſt Violence in the World to conſtrue them otherwiſe.

But by conſidering all the Parts of the Will together, it will appear that he did not intend an Eſtate for Life, but in Tail.

The Preamble, from which ſo much has been inferred, carries the Intention, whatever it were, to all his Lands whatſoever, to the Intent that all my Lands may go in my own Name and Blood; this was certainly the Reaſon that determined his Choice of the Perſons who ſhould firſt take the ſeveral Parts of his Eſtate, but there can be no Pretence for extending it any farther, for he has not purſued it through any one Limitation in the Will; the ſecond Man in this very Deviſe is made Tenant in Tail, and conſequently has a Power of barring the Remainder, though he be only of his Blood and not of his Name; if this be conſidered

conſidered as to the other Lands, it will be ſtill plainer, the Lands in *Emlod* are given to *T. B.* for Life, without Impeachment of Waſte, and then to the Heirs Male of his Body, which cannot be denied to be an Eſtate Tail, though all the Arguments from the Intent of the Deviſor, and the Clauſes about Waſte, held with equal Force here, as in the Caſe of the former Deviſe; upon which I beg Leave to obſerve that it would be very ſtrange if the Teſtator ſhould intend a leſs Eſtate and a worſe Intereſt to the firſt Taker, than to thoſe he has thought fit to poſtpone, and alſo the Words *without Impeachment of Waſte*, he has twice uſed them, and in one of the Places the Intent endeavoured to be collected from them is impoſſible, for they can be taken only as Words *ex abundanti*, and not operative, for though ſomething might be concluded from them if they were found only in this Place in the Will, yet ſince they are uſed in another Part to a different Intent, nothing can be inferred from them.

J. B. the firſt Deviſee of theſe Lands, is the ſecond Deviſee of thoſe in *Emlod*, which are given to him in Tail in the ſame Words as to *T. B.* but ſurely, if he had intended to diſtinguiſh this Man to his Diſadvantage upon any particular Suſpicion of him, he would have done it through the Will.

In *Loddington*'s Caſe there were plain Words declaratory of the Intention beſides theſe about Waſte; the firſt Deviſe is to his Brother, and afterwards to his Nephews, and then follows a Pro-

a Proviſo that his Nephews, to whom he had given his Inheritance, ſhould pay the Annuity; this was thought ſuch a Declaration of the Intent, as to exclude the firſt Taker from any Eſtate of Inheritance.

"If God ſhall bleſs him with Iſſue"; if theſe Words coming in after the Limitation to the Iſſue Male are not operative, they can make no Condition precedent, nor point out a future Time, the Diſpoſition had been as in the Caſe of *Clark* and *Day*, if God ſhall bleſs him with Iſſue Male, ſome Inference might have been drawn from them, but 'tis otherwiſe here.

From the Words *Heirs Males* of ſuch Iſſue Male, it has been inſiſted, that the Intention was, that the Iſſue ſhould have the Inheritance, and not the firſt Deviſee, but theſe are idle inſignificant Words, and the Word *Iſſue* before implied as much as they, for Iſſue even when a Word of Purchaſe takes in the remoteſt Iſſue without the Word *Heirs*.

This is ſaid expreſly by *Pollexfen* in his Argument in the Caſe of *King* and *Melling*, as to a Will, though he denies it as to Deeds.

Archer's Caſe is very different from this, for the Words there are, his next Heir Male, which can be underſtood only of the firſt born Son, and cannot in any Conſtruction as *nomen Collectivum*. So in the Caſe of *Clark* and *Day*.

Lod-

Loddington's Caſe is alſo in the ſingular Number, next Iſſue Male and his Heirs.

It is objected, that the various Penning of this Will, ſhews a different Intention in the ſeveral Parts, but this (if it proves any Thing) will prove too much for Mr. *Lutwych*, for it muſt be carried through the whole Will by his uſing all the different Manners of giving Eſtates Tail in different Places; as ſometimes to *A.* for Life, and after his Deceaſe to the Heirs Male of his Body; ſometimes to *B.* and the Heirs Male of his Body, *&c.* that the different Expreſſion is no Indication of a different Intent, but he had one Uniform Deſign of making an Equal Diſpoſition of his Eſtate in his Name and Blood, and for the doing this he has uſed various Expreſſions meaning the ſame Thing; much Streſs has been laid upon the Word *only* coming in after the Words *for Life*.

To this I anſwer, that taking the Words, for the Term of his natural Life, ſeparately and *per ſe*, without the Word *only*, they are of no Force to hinder an Eſtate Tail from paſſing, ſince the Reſolution in *King* and *Melling*, and as to that Word it has no Meaning at all, and cannot alter the Caſe, *et* the reſtrictive Particle is of uſe when applied to an Indefinite Expreſſion, and will aſcertain the ſame, but when applied to a particular Expreſſion which was certain before, it can ſignify nothing; the Addition of never ſo many Reſtrictives or Negatives are only ſo many Redundances. In this Caſe there is a preciſe particular Intereſt

tereſt given before, and this Word can neither extend nor reſtrain it, and then it will be exactly the ſame Caſe as *King* and *Melling*.

The Caſe in *Roll's Rep.* 837. mentioned by Lord *Hale* with *non aliter*, is in that Book, If the Son ſhould alien, then the Daughter ſhould have the Eſtate, this ſhews that the Power of Alienation *i. e.* of Inheritance, was veſted only in the Son, and not in the firſt Taker, which was the Reaſon of the Judgment as given in the Original Report; *non aliter*, it is not ſo much as taken Notice of there, and whether it be in the Record I cannot tell. Rol. Rep. 837.

I agree that if Iſſue was as certain and proper a Word of Purchaſe in a Will as a Deed, it would be hard to conſtrue it otherwiſe. But I inſiſt that in a Will it is not ſo, it is no Term after for that Purpoſe, the more frequent Conſtruction of it in a Will is, that it is a Word of Limitation, and this has been ſometimes carried ſo far as to be implied: If Lands are given to one, and if he dies without Iſſue, to *T. B.* this is an Eſtate Tail in the firſt Deviſee. The moſt beneficial Conſtruction is to be made ſo as to preſerve the Intent.

There is no Reaſon given in the Caſe of *King* and *Melling*, but holds equally in this Caſe, the other Words are proved to be inſignificant and make no real Difference, here is the Word Iſſue Male which is *nomen collectivum*, and of his Body lawfully begotten, which

which my Lord *Hale* calls the Eye of an Eſtate Tail.

To conſtrue Iſſue a Word of Purchaſe, will make *T. B.* but Tenant for Life, with a contingent Remainder to his Iſſue, which ſuppoſes a particular Intent for him, and differs his Caſe from all the other Deviſees under his Will, but to take it in the other Senſe will keep the Intention entire and conformable throughout, and the ſame Intereſt will be given to all of them.

As to the Verdict itſelf, that is not ſufficient to give Judgment on; by the Will the Lands in *Longborough* and *Emlod* are both given to *John Barker*, though not in equal Degree, and the Lands mentioned in the Declaration are only thoſe in *Longborough*, but the Jury find that the Lands given by the Will to *T. B.* and thoſe mentioned in the Declaration are the ſame, which is abſolutely impoſſible upon the Face of it.

Mr. *Latwych* (Reply): Nothing is to be inferred from the Intent in other Places of the Will, for the Deviſor might intend an Eſtate for Life only, and probably he did ſo when he uſed the Words *Heirs Male*, but being contrary to the Rules of Law, the Law will ſuperſede, but notwithſtanding, that where his Intention can take Place it ſhall.

The Leſſor of the Plaintiff being a remote Remainder Man, he might think it of no great

great Conſequence if he did give him an Eſtate Tail.

As to the Caſe in *Rolle*, *Hale* ſays *non aliter* was in the Will, though not in the Book, and that the Reſolution was founded upon them, and *Rolle* ſays nothing inconſiſtent with it.

There are no Words of Art proper for a Will, but if the Intention of the Teſtator does not appear to the contrary, the Words ſhall be taken in the ſame Senſe they would have in a Conveyance.

In *Loddington*'s Caſe, though ſeveral Reaſons are given for the Judgment, two of them are with us in this Caſe.

The Rule is, that where it is doubtful whether the Party intended the Words according to the Rules of Law or not, there they ſhall be taken according to the Rules of Law, for ſince there is as much Reaſon to think they were meant ſo as otherwiſe, it is fit the Law ſhould prevail.

The Objection to the Verdict will extend to the finding the Identity of the Lands mentioned in the Recovery, and if that be ſo, it is taken that there is no Recovery found.

Curia adviſare vult.

Regina

Regina v. *Freeman mayor de Thetford in Com' Norf. et Suff.*

Inform' v. Borough in two Counties; *Venire* from one.

INFORMATION laid in *Norfolk* to ſhew *Quo warranto* he is Mayor of the Borough of *Thetford* in *Com' Norf.* and *Suff.* and Uſurpation charged *apud Thetford in Com' Norf.* and *Suff.* The Defendant pleaded the Charter whereby the Method of Election is appointed, *viz.* that the Mayor for the Time being ſhould nominate two capital Burgeſſes, one of whom the freemen ſhould chooſe to be the Mayor, that the Defendant was ſo choſen a capital Burgeſs *apud Gulhald Burgi præd'*, that *Tirrel* the precedent Mayor nominated the Defendant and *T. S. de Capital' Burgen' juxta, &c.* and the Freemen choſe the Defendant, *videlicet apud Thetford præd' abſque hoc quod uſurp', &c.*

The Attorney General replied *proteſtando*, that *Tirrel* did not nominate Freeman, *pro placito quod Freeman de tempore Nomination' in placito ſuppoſit' non fuit de Capital' Burgenſ. et hoc pet', &c. ſurque Iſſue a Venire* awarded out of *Norfolk*.

After a Verdict for the *Queen*, Mr. *Brantwaite* moved in Arreſt of Judgment, that was a Miſ-trial, and a *Venire* ought to have been awarded out of the Counties of *Norfolk* and *Suffolk* both. If the Iſſue had been *uſurpavit vel non*, it would be well, becauſe the Uſurpation

tion is charged in *Norf.* only, but it is whether at the Time of the Nomination he was a capital Burgeſs of *Thetford*, which is alledged to be a Borough in the Counties of *Norf.* and *Suff.* this is a Fact ariſing out of both Counties, and at Common Law there muſt undoubtedly have been two *Venires*; the Queſtion is whether it be aided by any of the Acts of *Jeofails*, which by the Statute about *Mandamus's* and *Quo warranto's*, 9 *Ann. c.* 20. are extended to Caſes of Informations; the 21 *Jac.* 1. *c.* 13. does not extend to this, and only helps where a *Venire* was awarded of fewer or more Vills than it ought at Common Law, but it was to a Vill not at all mentioned, that was not within this Statute. *Hutton* 11. *Wilſon* and *Brigges* in Account, againſt the Bailiff of two Manors in different Counties, and held not aided for that Reaſon.

The *Stat.* 16 & 17 *Car.* 2. *c.* 8. goes ſomething farther, but there the Words are, ſo as the Caſe be tried by a Jury of the proper County where the Action is brought; and though this has been carried a great way, it was never yet adjudged to help the Caſe of one *Venire* where by Law there ought to be two; the Act only mentions one *Venire*, and it could never intend to take away the two, and make one ſerve. This may be *Caſus omiſſus*, and not under the Conſideration of the Law-Makers, being what ſeldom happens, like that in *Hutton* 111. where the Statute of Limitation was pleaded to a *Rationabili parte bonor'*, and the Court held it out of the general Words of the Act, being a Caſe that ſeldom happens.

Page contra: The Uſurpation is laid in *Norf.* and for ought appears, the Office of principal Burgeſs might be exerciſeable only in that County; but however this is a Trial in the proper County where the Action is brought, and therefore within the *Stat.* 16 & 17 *Car.* 2. *c.* 8. as it was ſettled in *Saund.* 226. where by the Juſtification the Trial ſhould have been at *Oxford*, and not at *London*, it was held well. 3 *Keble* 350. *Inkins* and *Hunſden. Vent.* 182. *Maynard*'s Caſe.

Trin. 3 *Annæ*, *Regina* v. *Wedenford. Monſtrans de droit* in *London*, for the Office of Warden of the *Fleet*, which appeared to be executed both in *London* and *Middleſex*, and held well though tried by a Jury out of *London* only.

This is very reaſonable, for it is a more favourable Caſe than that of one *Venire* out of a wrong County where no Part of the Fact aroſe, and yet the Statute helped it, for here ſome of the Fact aroſe in this County; if the Statute can help a greater Evil, ſure it may a leſs.

Branthwaite (replicando): The Caſe in *Saund.* was ſo; but the Court was divided, and *Twiſden* ſaid, that the Statute never intended to deſtroy the very Principles and Foundations of the Common Law, which ſuppoſes that Juries have Notice of Facts in their own County, and may give their Verdict on their Knowledge, and ſince *Holt* Chief Juſtice was always of Opinion againſt it. But he held himſelf

himſelf bound by the Authority of it, though he thought it not altogether a right Reſolution, becauſe the Words are not barely the County where the Action is laid, but the proper County which he thought muſt have ſome Meaning.

Branthwaite: If that Caſe extended the Statute beyond the Intent, there can be no Reaſon for carrying it farther, and this Caſe was never yet adjudged to be within it. *Regina* v. *Wedenford* went upon another Reaſon, beſides *London* cannot join with *Middleſex*, becauſe when a Jury comes out of two Counties the Trial muſt be at Bar, and in that Caſe the Party may elect in which County he will try his Cauſe.

18 *Hen.* 6. 10. ſhews the true Reaſon of the Common Law in this Caſe, that the Jurors of one County cannot try what was done in the other, and therefore they ſhould join.

Parker Chief Juſtice: I do not ſee any Fact alledged, that ariſes in *Suff.* to make it neceſſary for that to join; the Fact of the Election muſt ariſe out of one County only, and it appears to be in *Norf.* by Reference, the Information charges the Claim of Mayor to be in *Norf.* and you ſay you were choſen *exiſten' de cap. Burg' apud Guihald Burgi præd'*. 18 *H.* 6. 10. the Fact was alledged in *Suff.* and yet it is inſiſted Jurors ſhould come out of that County.

N. B. On the laſt Day of the Term the Court ſaid there was nothing in the Exception, and gave Judgment for the Queen without Argument.

Cur' adviſare vult.

Domina Regina v. *Nuns.*

Indictment for Words ſpoken to Juſtices of Peace at the Petty Seſſions. 10 Mod. 186.

INDICTMENT for Words, *viz.* "*This* "*is not Juſtice of Peace's Buſineſs, you ſhall* "*not try this, have a Care what you do, I* "*have Blood in me if I had you in another* "*Place.*"

After Verdict for the *Queen*, Mr. *Blundel* moved in Arreſt of Judgment, that theſe Words are not indictable, that the firſt only contentionary, and the reſt have no Certainty. *If I had you in another Place*, ſhews only a Deference paid to them in reſpect of the Place and Capacity they were then in, and are in Avoidance of Plaintiff's Slander.

Mr. *Whitaker* on the ſame Side inſiſted, that the Words do not tend to a Breach of the Peace, and conſequently not indictable; Scandal is not ſufficient as in Sir *Rowland Gwyn's* Caſe. "Sir *R. G. is a Fool, an Aſs,* "*and a Coxcomb, and knows no more Law than* "*a Strickhill,*" and yet held not indictable, *Mich.* 4 *Annæ*, *Regina* v. *Soley*, "*He is not* "*fit to be a Juſtice of Peace, and if a Cauſe* "*come before him he will give it for* J. S. "*right or wrong,*" *held not indictable.* Hil. 11 Annæ, Regina *v.* Legaſſeek, "*This is a* "*Numſcul's Order and the Juſtice deſerves to* "*be hanged for making it,*" *held not indictable.*

See Salk. 698. 10 Mod. 187.

But

But ſuppoſing the Words indictable, they are not well laid; it is ſaid that he being before them *ex cauſâ prædictâ* ſaid the Words, but it is not alledged before whom that Cauſe was, nor whether it was within the Conuſance of the Juſtices.

If indictable at all, not ſo before Juſtices of the Peace, but of *Oyer* and *Terminer*, who have Conuſance *de verborum propalationibus*; it is a Matter not within the Commiſſion of the Peace, no more than Perjury or Forgery.

For ought appears, the Proceedings of the Juſtices might be irregular and illegal in a Matter out of their Authority, and then the Meaning of the Words can be no more than that they had no Juriſdiction, and he had Spirit enough to conteſt it with them in another Place, *i. e.* a proper Juriſdiction.

Mr. *Lutwyche contra:* The Words tend to a Breach of the Peace, and in that Reſpect differ from the Caſes cited, which are only of ill Manners; theſe import a Challenge or Threatning, though not directly, "*but if I* "*had you in another Place*," which is a common Way of menacing, and though the Phraſe be dark and covert, that will not alter the Caſe.

In *Hobart* 120. The Caſe was, *Markham* Hob. 120. diſperſed Letters of Provocation to challenge the Lord *Darcy*, obſcurely penned, for which the Star-Chamber fined him 500*l.* the Book ſays, that in this they proceeded by the Com-

mon Law, and wherever the Star-Chamber exerciſed a Juriſdiction lawfully, this Court may exerciſe the ſame.

In the Caſes cited, the Words are in the third Perſon ſpoken of the Juſtice, not to them in the Execution of their Office, as here.

If theſe Words imply a Challenge, then they tend to a Breach of the Peace, which is the proper Subject of their Juriſdiction, whereas Perjury and Forgery are not within their Commiſſion.

Blundel replicando: The Words in *Hobart* are, "*You lie, and I will maintain it with my* "*Life,*" which is a direct Challenge. *Roll. Abr.* 78. Bare Motives to a Breach of the Peace are not indictable, but they muſt tend to it directly. *Mod.* 3. If it were not Aſſize Time I would, *&c.*

It was held that the firſt Words ſhewed plainly an Intention not to break the Peace at that Time, which Conſtruction is very agreeable to the Words, "If I had you in another "Place;" beſides Words are not to be made a Breach of the Peace by Conſtruction.

Parker Chief Juſtice: The Words do indeed look like a Challenge, but the Judgment is, that the Juſtices were not upon the *Queen*'s Buſineſs, and the Defendant being before them, ſpoke the Words *ad depravand' authorital' Juſtic'*, not ſaid to them, *innuendo offenſo præd.*

præd. for which he was before them, whereas no Offence is mentioned before, and if it was a Matter not within their Juriſdiction, it would be no Crime to ſpeak in Depravation of their Authority; the Condition of the Perſon ſpeaking; who is indicted by the Addition of a Wheelwright, makes it the leſs likely that a Challenge was intended; beſides this differs much from Lord *Darcy*'s Caſe, there was a Contrivance to challenge and procure a Fighting, and upon that the true Difference is for Words that tend to a Breach of the Peace, and not ſuch as are only likely to provoke the other to break the Peace, but muſt ſhew an Intention in the Speaker, and that they were ſpoken on purpoſe to procure a Fighting and Breach of the Peace. *Mod.* 3. is a ſtrong Caſe.

Rule of Words indictable.

Eyre: Juſtices ſhould have bound the Defendant to his good Behaviour, but I am very doubtful whether theſe Words are indictable, they do not import a Challenge of Fighting, but only a Denial of their Juriſdiction, and that he would diſpute it with them, and if the Matter was not within their Juriſdiction they might be told ſo, and that he would appeal to another, we are to take Words *in mitiori ſenſu*; in order to make this a depraving their Juriſdiction, the Matter ſhould have been ſhewn to be within it, which not appearing, it cannot be taken as a publick Crime: A vilifying the Authority of the *Queen*'s Commiſſion.

Mod. 3;

J. *Powys*: The Words I believe meant, that he had Courage in him, and ſeem Words of Threatning, though dark, but they have not laid a proper Introduction for a Foundation, beſides they were not without a proper Remedy, for an Offence to a Court may be ſuch for which the Party may be committed, and yet not indictable.

Parker Chief Juſtice: Threats may be a Breach of the Peace, as they ſtrike a Terror into the People, but this Indictment is not ſo laid.

Per Cur' Judic' arreſt quouſque Cur' aliter Ordinaverit.

Turner v. *Goodwyn.*

Poſt.

THIS Caſe was argued the ſecond Time.

10 Mod. 153, 189, 222. See 6 Vin. Abr. 84. Pl. 67. *in Notes.*

Serjeant Pratt for the Defendant: The Queſtion is whether the Aſſignment of the Judgment be a Condition precedent to the Payment of 1500 *l.* the Words are, "the Obligor ſhall pay to the Obligee 1500 *l.* upon ſuch a Day, the Obligee aſſigning the ſaid Judgment to the Obligor"; theſe are I think very plain, and capable of no Conſtruction or Senſe which can make the Intention of the Parties effectual to any Purpoſe whatſoever.

It cannot be taken as any Agreement between the Parties, becauſe it comes in the Condition

Condition of a Bond, which is the Words of the Obligor only, ſo that he can have no Remedy againſt the Obligee, and to inforce an Aſſignment; *Saund.* 320. received a different Conſtruction merely upon this Reaſon, becauſe there were mutual Remedies.

It cannot be taken as a Condition ſubſequent, for then it would not be effectual but void, for the Money being once paid would not be brought back again, in the Caſe of Non-performance. 2 *Danv. Abr.* 15. held that a Proviſo ſhould not defeat a Deed and work a Releaſe until Performance, *Paſc.* 9 *Car.* 1. *Parker's* Caſe.

If then it can neither be a bare Agreement nor a Condition ſubſequent, it muſt be a Condition precedent, and no Inconvenience can poſſibly ariſe from hence, for immediately upon the Aſſignment the Obligee would be intitled to the Money, and if not paid muſt have an Action upon the Bond, and he has only changed his Security, and taken better in his Judgment inſtead of a worſe.

If it be admitted that the Words in this Caſe are very proper to make either a Condition precedent or ſubſequent, yet they muſt be conſtrued according to the Intention of the Parties. *Jones* 189. *Spring* and *Ceſer.*

Conſtructions have been made of Conditions precedent, upon a ſubſequent Declaration of the Intent of the Parties, 3 *Lev.* 132. and ſo the Courſe has always been to take it according

cording to the apparent Intention, notwithſtanding the Words ſeemed more proper for the one than for the other; nay ſometimes to make a Condition, though the Words did not expreſs it, if the Intention appeared. *Co. Lit.*

It has alſo been the Method of Conſtruction of all Conditions to underſtand them in favour of the Party's Remedy, and ſo as that may be moſt effectually attained; in the 5th *Rep. Grey*'s Caſe, they conſtrued the Common a Qualified Common, and that the Party had it *ſub modo*, in order to give the Lord a Remedy for his Rent. *Vent.* 147. Count to pay Money, the Plaintiff making a ſufficient Eſtate in ſuch Lands, adjudged a Condition precedent.

If this be a Condition precedent, it follows that the Defendant's Condition is not broken, the Plaintiff being to do the firſt Act; and this was plainly a Matter in his own Power, for he might have made an Aſſignment without the Concurrence of Defendant, and an Intereſt would have veſted, and could only have been deveſted by a ſubſequent Refuſal. *Butler* and *Barker*, *Hob.* 69.

Serjeant Cheſhire contra: The Queſtion is rightly ſtated, but I inſiſt that from the Nature of this Condition, and Terms of the Agreement, theſe Acts are to be in a Sort concomitant, but the Defendant is to do the firſt in order of Time.

It

It is not material how the Matter would have ſtood ſingly on the Defendant's Plea, for now the Law ariſes on that, and the Replication is, that the Plaintiff was ready to aſſign, and requeſted the Defendant to pay the 1500*l.* but he did not pay, *&c.* Now Requeſt and Non-Payment is a Refuſal abſolute, and excuſed the Plaintiff from preparing the Aſſignment; but it muſt have been otherwiſe if he had told the Plaintiff his Money was ready, and bid him provide the Aſſignment.

The Payment of the Money ought to precede the Aſſignment in Reſpect and for the Benefit of the Obligee, for it would be very unreaſonable to oblige him to part with his Security before he had his Money; beſides, the Aſſignment would not be good without a Conſideration, and in order to that, the Money muſt be recited to be paid, which if done before Payment would be a Falſity, and no Man can be bound by Law to execute a Falſity; beſides the Party would be bound by this Acknowledgment in his own Deed, and eſtopped from ſaying the Money was not paid, afterwards at Law; an Aſſignment of a Choſe in Action is not good, and has been held Maintenance, and can now be only made good in Equity by the Conſideration; ſo the Plaintiff muſt either have made a bad Aſſignment, or recited a Falſity to make it good.

Noy 52. 3 Cro. 552. 3 Cro. 170. 34 H. 6. 30. Bro. Maintainance.

The Conſtruction laboured for on the other ſide is unnatural, for in that Caſe the Plaintiff would have but one Day to make the Aſſignment, and probably the Defendant would have kept

kept out of the Way for that Time, and thereby defeated the Bond.

The Defendant is to be in the Place of *Dibble*, and the Bond is to enure by way of Subſcription only; but this Conſtruction would put the Defendant in a much better Caſe than *Dibble*, for the Plaintiff is not, it ſeems, to aſk Satisfaction of him, but upon ſuch Terms as would deſtroy the Security.

The Meaſure of Conſtruction in theſe Caſes muſt be ſuch as will make the Agreement of the Parties ſenſible and practicable, and not ſuppoſe them weak and ignorant.

The Caſes of *Thorpe* and *Thorpe*, *Lutw.* 1250. 4 *Leon.* 41. *Trin.* 3 *W. & M.* and *Bartlett* and *Wootton*, *Rot'lo* 466. are for me. Covenant in Marriage Articles to pay Money on the Birth of the firſt Child, to be laid out in Land, provided the Money be not paid till the Land be purchaſed; but notwithſtanding that the Court held the Money ſhould be firſt paid, ſince the Land was to be purchaſed with it. 3 *Lev.* 103, *Cole* and *Walton*, is in full Point.

Pratt (replicando:) The laſt Caſe is nothing to the Purpoſe, for the Words are Expreſs, that upon Payment of the Money he ſhould aſſign the Bond.

My Brother would have us firſt tender the Money, but that would have been dangerous, for perhaps the Plaintiff might have taken it, and

and then we ſhould have been without Remedy.

It is Begging the Queſtion to ſay the Aſſignment would be void without acknowledging the Payment; for if this be a Condition precedent, to have recited this Bond and Condition, by which it would appear he was obliged to it, would have been a good Conſideration.

It is ſaid the Defendant was to ſtand in the Place of *Dibble*, but by this Conſtruction he would be in a better Caſe: But this I deny, he has given compleat Security to pay the Money, and it is no ſtrange Thing that one Man's Bond ſhould be better than another's Judgment.

The Caſe cited in 2 *H.* 7. is only, that *J. S.* ſhould pay Money, *recipiens cras Acquittance*, and ſurely from the Nature of the Thing it could never be made a *Quære*, whether the Acquittance ſhould be given before the Money was paid.

Curia adviſare vult.

Domina

Domina Regina v. *Stafford.**

6 Outlawry for High Treaſon reverſed, 10 Mod. 188. *Quære* whether *Sci. fa.* ought to go to the Ter-Tenants.

MR. *Stafford* was outlawed upon an Indictment of High Treaſon in the Reign of King *W.* 3. and now by her Majeſty's Licence brought a Writ of Error of that Judgment, on the 10th of *November* this Term he appeared Perſonally at the Bar, and moved by his Counſel Mr. *Salkeld*, that the Record of his Outlawry might be read, which being done by the Clerk, and the Defendant aſked what he had to ſay why the Court ſhould not award Execution, Mr. *S.* prayed the Writ of Error might be read and allowed, which being done, the Aſſignment of Errors on Record was read, which was an Error in Fact, *(viz.)* that he was Indicted by the Name of *John Stafford*, Eſq;

Whereas *tempore Captionis*, &c. he was Yeoman, and *hoc paratus eſt verificare*, &c. this was confeſt by Mr. Attorney General upon Record, and he declared in Court that he had the Queen's particular Orders for ſo doing; but *Parker*, Ch. Juſt. made a Doubt whether the Ter-Tenants ſhould not be brought in upon *Sci. fa.* in this Caſe, as the Lords mediate and immediate and Ter-Tenants are in the Caſe of

Co. Ent. 858.

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* *N. B.* This Gentleman was Brother to *Stafford*, who was Beheaded in King *Charles* the Second's Reign, and had been Vice-Chamberlain to Queen *Mary* in *France*.

of Felony, for the ſame Reaſon ſeems to hold for the Grantee of the Crown as of the Lord.

Hereupon Mr. *Salkeld* endeavoured to diſtinguiſh, for that in the Caſe of Felony the Lord and Tenants are both perfect Strangers to the Proceedings, and ſuppoſed adverſe throughout; but here the Party cannot come in to bring his Writ of Error without the Leave of the Crown, and the Grantee ſtands but in the King's Place, and takes the Lands upon theſe Terms, *tranſit terra cum onere*. Several Precedents were inſpected on this Occaſion, (*viz.*) *Trin.* 1 *W. & M. R.* v. *Bettiſcomb. R.* v. *W. Hewling*, *Rot'lo* 4. *R.* v. *B. Hewling*, *Rot'lo* 5. *Paſch. W. & M.* Lord *Maullfield's* Caſe, *Rot'lo* 8. *Mich.* 1 *W. & M. Rot'lo* 4. *R.* v. *Gray*, *Paſch.* 2 *W. & M. Rot'lo* 3. *R.* v. *Gliſſon*, *Hil.* 1 *W. & M. Rot'lo* 6. *R.* v. *Sacbill*, *Rot'lo* 7. *R.* v. *Cox*, *Rot'lo* 8. *R.* v. *Hucker*, *Mich.* 2 *W. & M. Rot'lo.* 7. *R.* v. —— *Hil.* 4 *W. & M. Rot'lo* 7. *R.* v. *Fugan*, *Trin.* 11 *W.* 3. *Rot'lo* 1. *R.* v. *Bellew*, *Trin.* 3 *W. & M. Rot'lo* 4. *R.* v. *Parker*, *Bar. Paſch.* 4. *W. & M. R.* v. —— ——, *Trin.* 10 *W.* 3 *Rot'lo* 2. *R.* v. *Bond*, *Bar.*

It was found that no ſuch *Sci. fa.* iſſued in any of theſe Caſes; and Mr. *Harcourt* acquainted the Court that he could find no proceedings of it ſince *Edward* the Third's Time; upon which the Outlawry was reverſed, the Reverſal being pronounced by Mr. Juſtice *Eyre* (*abſente* L. *Powis.*)

Then

Then the Defendant was arraigned upon the Indictment, and pleaded her Majeſty's Pardon upon his Knees, which was read and allowed; but the Juſtice obſerved that the Pardon was granted to *John Stafford*, Eſq; which was repugnant to the Error aſſigned, but being alſo *Quocunque alio nomine nominat'*, it was held well, and the Defendant went quit, and that Night preſented Gloves to the Judges, *i. e.* four Guineas to each Judge.

Quære tamen as to the Ch. Juſtice's Doubt upon the want of a *Sci. fa.* againſt the Grantee, for I find in the Caſe of The *King* and *Wallcot*, *Trin.* 7 *W.* 3. Error was brought of an Attainder of High Treaſon, and aſſigned for Error, that in that part of the Judgment *Interiora ſua extra ventrem capiantur*, the Words *Ipſo vivente* or *in Conſpectu ipſius* were omitted, which the Court held to be a fatal Exception, and contrary to all the Precedents; and for that Cauſe pronounced the Reverſal; and at another Day in the latter End of the Term, Sir *John Trevor* Attorney General moved the Court on behalf of the Lady *Roſcommon*, the Patentee of the Eſtate, to Reſpite the Entry of the Reverſal, upon Allegation that ſhe had no Notice, upon which was given a Day until *Michaelmas* 7. when Serjeant *Darnell* and Mr. *Carthew* argued for the Lady, after which the Court heard ſeveral other Arguments, till *Trin.* 8 *W.* 3, when they unanimouſly refuſed the Attainder for the ſame Error.

Carth. 348.

Quære the Caſe of *R.* v. *Armſtrong*.

Regina

Regina v. *Stone.*

SERJEANT *Webb* moved to quash an Indictment found at the Sessions of the Peace for *London*, *Quare vi et armis summa' 10 s. and 3 d. de quodam J. Hodges illicite et falsè decipiebat*; *sed non allocatur*, for quashing is *ex gratiâ Curiæ*; this appears to be for a Cheat, and whether well laid or not, will come properly on a Demurrer.

Indictment for a Cheat not quashed.

Jackson and *Amery.*

CASE, the Plaintiff declared upon a promissory Note; the Defendant pleaded 5 *Ann. c.* 3. that he became Bankrupt (*tali die*) and that before that Time, and *adhuc* he was indebted to *J. S.* in 100 *l. et ultra*, that a Commission issued, and Commissioners proceeded and made a Certificate, that he had conformed in all Things to the Statute, *&c.* (*prout* the common Form,) and that *J. S.* refused to subscribe the Certificate 'till the Defendant gave *nota' præd' in narr' men'conat' vel hujusmodi nota'* to the Plaintiff, in Trust for *J. S. per quod* he gave the Note in *Narr'* to the Plaintiff, in Trust for *J. S. ea intentione* to induce him to subscribe the said Certificate; *et hoc*, *&c.*

Action *for* Note given by a Bankrupt to induce a Creditor to sign his Certificate; pleads Statute 5 Ann. c. 3. Post.

The Plaintiff demurred in Law, and Mr. *Salkeld* upon Argument insisted, that this general Way of pleading *decoctor devenit* is not

Manner of pleading the Bankruptcy.

good, but the Defendant ought to ſhew the Acts whereby he became a Bankrupt, the Bankruptcy is only a Collection or Concluſion of Law upon certain Facts, which ought to be ſet forth for the Court to judge upon, and not the Pleader to give his own Judgment only; in pleading in Abatement 'tis not enough to ſay *quod abatavit*, but you muſt ſet out the Thing itſelf, *viz.* An Entry after the Death of the Anceſtor before the Heir enters. *Co. Ent.* 397, 674. 14 *H.* 6. 6. 4 *Co.* 6. *b.*

The Defendant has not ſhewn himſelf ſuch a Bankrupt as is intitled to the Benefit of this Act, for it is relative to that of 4 & 5 *An.* and muſt be ſo conſtrued by that firſt Statute. A Surrender of himſelf within 30 Days, and a Transfer of his Effects, is required, and therefore ſhould be ſet forth in the Plea, but here it comes in only by the Commiſſioners Certificate.

This amounts to the general Iſſue, and the whole Matter might have been given in Evidence upon that; here is nothing pleaded for the Plaintiff to traverſe, but the *eâ intentione ad inducend' ſubſcribere*; he ſhould have pleaded by way of a corrupt Agreement.

Mr. *Whitaker contra:* We have ſaid we became Bankrupt *tiel jour & ann.* and the Act requires no more.

It is not neceſſary that we ſhould bring ourſelves within the Act of 4 & 5 *An.* but it is enough

enough if we bring ourſelves within the particular Proviſions of the latter Act.

That is indefinite; and uſes the Words any Bankrupt; and not reſtrictive to ſuch Bankrupt as is within the former Act.

The Matter of this Plea would have come in upon the general Iſſue, but it is not ill for that Reaſon; for if a Plea diſcloſes a Point of Law as well as Matters of Fact, it is at the Election of the Pleader to plead it generally or ſpecialy. Thus in the Caſe of Infancy, which may be given in Evidence upon *Non aſſumpſit*, but ſurely it is more for the Advantage of the adverſe Party, when the ſpecial Matter is ſhewn, and he is apprized of the Truth of the Caſe.

Parker Chief Juſtice: This ſeems too general a Way of pleading, *quod deven' decoctor*, ſurely he ought to ſhew the ſpecial Matter in order to bring himſelf within the Meaning of thoſe Words.

The Deſign of this laſt Act was only to extend to Bankrupts intitled to a Certificate, and to be thereupon diſcharged; but if the Defendant was never diſcharged, I dont ſee how the Act can operate upon this Note, for he is not damnified by the giving of it, and for this Reaſon it ſeems that he ought to have ſhewn himſelf ſuch a Bankrupt as is within the Act 4 & 5 *An.*

Eyre: Though the Words of the laſt Act be *any Bankrupt*, yet it muſt be taken to be ſuch as is intitled to be diſcharged, and that muſt appear by the Words of the Plea, and not only of the Certificate, and ſince that is not done, conſequently he has not ſhewn himſelf to be ſuch a Bankrupt as is by this Act made incapable to give ſuch a Note.

As to the firſt Exception to the *Decoctor devenit*, I think it was held in an *audita querela*, *Robinſon* v. *Bailey*, that it was neceſſary to ſet forth the ſpecial Acts.

Ulterius conſilium proximo Termino.

Calverly v. *Calverly*.

Prohibition. Suit v. Executor for a Diſtribution of the *Reſiduum*. Antea 10.

THE Court granted a Prohibition to ſtay the Suit of a Diſtribution of the *Reſiduum* of the Teſtator's Eſtate undiſpoſed of, with Direction to declare upon it immediately; *Et per Parker* Chief Juſtice: The Queſtion is whether there can be a Diſtribution in this Caſe within the Equity of the Statute.

Mr. *Lutwyche* for the Defendant ſays, it is a Truſt in the Executor; if that be ſo, the Court of Chancery has indeed a Juriſdiction in it, but not the Eccleſiaſtical Court.

Quære, and Note the Executor is *Hæres defuncti*, *nemo poteſt Teſtatus & Inteſtatus decedere.*

Larkin

Larkin and *Turner*.

CASE by the Steward of a Manor, *Indebitat' aſſ' pro opere & labore in admittendo J. S.* to a Copyhold, *et pro feodis ſuis in ea parte in & circa præd' J. S. ad un' al'* Copyhold, *aſſumpſit ſolvere quantum meruit, et pro opere et labore ult' mentionat' et pro feodis ſuis in ea parte*, and avers the *quantum*.

Promiſe by a third Perſon larger than Conſideration upon Requeſt.

Verdict for the Defendant on the firſt Promiſe, and for the Plaintiff on the laſt. It was moved in Arreſt of Judgment, that as to the *Feodis*, this is the Promiſe of a third Perſon upon a Conſideration paſſed without a precedent Requeſt, and therefore the Action did not lie, according to *Dyer* 272. *Sed per Curiam*, The Action well lies, for the Work and Labour is the Conſideration, and that was done upon Requeſt, and the Fees are promiſed for that as well as the reſt; in Conſideration that you have done Buſineſs for my Friend in your Office at my Requeſt, I will pay you as much as you deſerve for your Labour and Fees in that Behalf, is ſurely a very proper Promiſe, eſpecially ſince a Verdict is found upon it.

Parker Chief Juſtice: The Fees are for the Work and Labour, ſo that it is Promiſe to pay his Fees and alſo his extraordinary Labour over and above, and this is a Reaſon alſo why a *quantum meruit* will lie in this Caſe.

Regina v. *Inhabitantes de Whitechapel.*

Order of Juſtices to ſend Vagrants to the Place of their Birth. Antea 9. Seſſ. Caſ. 50. See 17 Geo. 2. c. 5. and 26 Geo. 2. c. 34.

SIR *P. King* came to ſhew Cauſe on the laſt Rule, and Mr. *Darnel* took ſeveral Exceptions, *viz.* that vagrant Children ought to be ſent to the Place of Settlement of their Father and not of their Birth, and conſequently the firſt Juſtices had done right, or ſuppoſing they had not, yet it ſhould have been ſet aſide by the Seſſions on Appeal, and not by two other Juſtices by original Order, and yet there was no Complaint or Recital of thoſe Children being come into any Pariſh to found a Juriſdiction in the Juſtices. *Sed non allocatur per Curiam*, for by expreſs Words of 39 *El. c.* 4. Vagrants are to be ſent in the firſt Place to the Place of their Birth, and the Act of Parliament gives no Appeal to the Seſſions from an Order of Vagrancy, neither is any Complaint required, and it is well enough ſet forth, that they were come into *Great Dalby*, for it appears that they were brought thither with the firſt Order there recited.

2 Bulſt. 351.

Uncertainty of the County where the Pariſh lies. 2 Ld. Raym. 1360.

Parker Chief Juſtice: I have heard it mentioned by my Lord Chief Juſtice *Holt*, whether upon a Vagrant's being ſent to the Place of his Birth, upon 39 *El.* that Pariſh would ſend him over to the Place of his laſt legal Settlement, but it has never been adjudged; it

is

is indeed conſiderable, and upon that the Queſtion will ariſe, whether Vagrancy defeats all Settlements or not.

Eyre: Here is a fatal Exception, it is to remove to the Pariſh of *Whitechapel*, *London*, or *Middleſex*, ſo that it is uncertain what County it is in, and we cannot take Notice where it is, for I am afraid we cannot take Notice what County *Weſtminſter* is in though we ſit here; *London* or *Middleſex* cannot be taken as Part of the Name of the Pariſh, for then it will have no County at all. See 5 *Geo.* 2. *c.* 19.

Per Curiam ordines caſſentur.

Regina v. *Inhabitantes de Saffron Walden* in *Eſſex.*

A bad Order of Juſtices quaſhed by the Seſſions generally. Caſ. of Set. & Rem. 12.

TWO Juſtices made an Order of Removal without an Adjudication of the Perſons being likely to become chargeable, and the Juſtices of Seſſions ſet it aſide, and entered only a general *Caſſetur.*

Sir *James Montague* moved to quaſh the Order of Seſſions, becauſe the Reaſon of the Judgment was not ſet forth, or if the Court ſhould be of Opinion againſt that, to confirm it ſpecially, for the Inſufficiency of the firſt Order, as in the Caſe of *South Cadbury* and *Braddon*, *Mich.* 9 *Ann.* for that otherwiſe the Pariſh who prayed the Removal will be con-

cluded without being heard upon the Merits; his Argument was exactly to the same Purpose as in the Case of *Henisted*, *Norris* and *Chevely*, *Mich.* 10 *Annæ*, *quod vide postea.*

But he cited further the Cases of *Lidbury* and *Fielden*, *Hil.* 7 *Annæ*, *Wallingford* and *Reading*, *Mich.* 8 *Annæ*, and *Leatherhaven* and *Fielden*, *Mich.* 10 *Annæ*, *n.* 35.

Parker Chief Justice: I was of Opinion for that Rule in the Case of *South Cadbury*, but it was a Novelty, and I think the antient Simplicity of the Rules ought to be preserved, the rather because at last that Insertion of the Reason of one Judgment may not mend the Case: But though an Order of Sessions may be conclusive upon the Parish, though founded only on the Insufficiency of the first Order, and it is fit to be recommended to the Justices to make an Order in the Case, setting forth the special Matter, that the Question may come to be determined.

It is indeed proper for the Justices of Sessions to consider first, whether the original Order be good before they go upon the Merits, and if it be found bad to declare expressly that they quash it for that Reason, because the Clause of the Statute, which makes the Determination of the Sessions conclusive, manifestly supposes the first Order good; I say it would be well if this were done, but I am afraid such a Determination now would overturn Multitudes of Orders already made.

Eyre:

Eyre: It appears beyond Controverſy that the original Order was well quaſhed, and I cannot think it neceſſary for the Juſtices to ſet forth the Reaſon of their Judgment, for they are Judges of the Fact as well as Law, and therefore we ſhould rather preſume that they have done right than otherwiſe.

I am much more againſt ſetting forth the Reaſon of our Judgment in the Rule, for 'tis an Innovation, and what is never done in any Judgment of any Court of *Weſtminſter-Hall*, the Form has only been *Conſiderat' eſt*, or *viſis præmiſſis Conſiderat' eſt*, and it is ſuppoſed that the Reaſon appears upon the Face of the Record.

Surely the two Juſtices had a Juriſdiction in this Caſe, for it is the Complaint alone which gives that, and the reſt is only Matter of Judgment and Exerciſe of their Juriſdiction. The Complaint gives Juriſdiction.

T. Powys accordant, and thought it proper to be recommended to the Juſtices of Seſſions as mentioned by the Chief Juſtice.

Regina v. *Smith*, *an Alderman of Nottingham.*

THE Defendant was convicted laſt Aſſizes upon an Information for ſaying "Damn the Queen," and now the Court fined him thirty Marks, and committed him 'till Payment. Information for ſaying Damn the Queen; Fine.

Note;

Note; Mr. Juſtice *Eyre* ſaid in giving Judgment, that the Court would have awarded a more exemplary Puniſhment, if Baron *Price* who tried the Cauſe had not certified, that the Words were Words of Raſhneſs and Heat, and that his uſual Behaviour was proved to be dutiful and loyal, in ſo much that the Jury made a great Difficulty in finding him Guilty.

Lomax v. *Cullum.*

A *Fieri facias* iſſued to the Sheriff of *Eſſex*, returnable *tres Mich'*, whereupon he returned that the Writ was returned to him 19 *Auguſti*, *Virtute cujus* he ſeized the Defendant's Goods, *viz.* *Prout* in a Schedule annexed, and that they remained in his Hands *pro defectu emptorum* 'till 27 *Sept.* that on that Day, and *ante* the Sale, an Extent *ſcacc' ad ſect. D'næ Reginæ* came to him to extend the Defendant's Goods, whereby thoſe in his Hands were ſubjected, and thereupon he took an Inquiſition, and theſe Words were found upon it, and therefore ought to be taken *ad ſatisfaciendum D'næ Reginæ*, *per quod* the Party's Execution Money would not be levied of them, *quodque Defen' nulla al' bona ſeu Catalla*, *&c.*

Mr. *Moxon* moved to quaſh this Return, becauſe the Goods were bound by the Plaintiff's Execution before the Extent came to the Sheriff.

Parker

Parker Chief Juſtice: I believe the Courſe is, that if the Prerogative Writ comes before the Goods are ſold, they ſhall be ſubject to it, notwithſtanding the Seizure by the Party's Execution, but in that Caſe the Sheriff ſhould return *Nulla bona* only, and then the Party may bring his Action for a falſe Return, and the Queſtion of Law will come properly upon that, whether the Goods are ſubject to the Party's Execution or not.

Eyre: This is a Sort of a ſpecial Verdict on the Return of a *Fieri facias*, here is nothing for us to give Judgment upon, but it is only a praying the Direction of the Court; this cannot be, the Sheriff muſt obey the Writ or not at his Peril, and can make no other Return but *Nulla bona* or *Fieri feci.*

The Caſe of ——— which prefers the Crown's Execution before the Party's at any Time before the Sale, has been often granted. Rol. Abr. 158. Execution *pur Dets Del Roy* (G).

Per Cur': *Return' caſſetur niſi cauſa.*

Devœdel v. *Toker.*

PER Mr. *Clark*: It was ſettled in Lord Chief Juſtice *Holt*'s Time, that Bail taken before the Continuance Day is Bail of the precedent Term, and afterwards of the ſubſequent Term. Bail Civil. *Regula.*

Mr.

Mr. *Fortescue* for Leave to enter a Recognizance of Bail of *Trin.* 9. being the Term wherein it was acknowledged.

Addition Bail. *Brantbwaite contra* objected, that the Defendant, against whom the Plaintiff is now proceeding, is but additional Bail, put in *Michaelmas* following, and therefore the Entry ought to be of that Term and not a precedent one, because the Lands will be made liable, which may be a Fraud upon Purchasers.

Mr. *Clark* acquainted the Court, that the Practice was to make the whole Entry of the same Term the first Bail acknowledged, but *Parker* Chief Justice seemed to think it would be more proper to enter it all of the Term; there was a Question, if Bail to be put in one Term, and new Bail are added the next Term after, if this should be Bail of the first Term, or only of the Term when added; the Clerks differed much about it, but the Court were of Opinion that it should be a Bail of the Term the additional Bail was put in, for they said it was not Bail 'till compleated and accepted, and making the additional to the Bail of the first Term might be a Wrong to a third Person, who might be a Purchaser after the first, and before additional put in; *Per Curiam Hil.* 10 *W.* 3. *B. R.* the Supplement was added because 'till then the Thing was not complete and perfect, nor could the Party be properly said to be *Traditus in Ballium*, whilst the Bail are suspended by the Exception, and the Court had not accepted it, and from hence no Inconvenience would ensue to a Stranger

Stranger, (as there may be by the other Method;) and as to the Plaintiff he conceived, if the Bail had made any Alienation between the Time of their acknowledgment and the adding of the laſt, he might except againſt them anew for that Reaſon.

Eyre: If this ſhould not be a Lien upon the Land from the Time of the Acknowledgment, then no Miſchief can ariſe from anticipating the Entry, indeed it ſeems to be a Lien, but it has not yet been determined, but it is very well argued in *Cro. Jac.* 449. *Baſkervile* v. *Brocket*, *Hob.* 195. *Vide* 29 Car. 2. c. 3. Statute of Frauds and Perjuries, *quoad hoc.*

The Point being unſettled, the Court ruled that they ſhould enter the Recognizance *ſecundum Curſum Curiæ.*

Skinner and *Newton.*

MR. *Lutwyche pro Quer' in Error'*, *Hil.* 3 *W.* 3. in *C. B. Lutw.* 124. Action on the Caſe for diſturbing his Way *apperten' cuidam peciæ paſturæ ipſius quer' continen' per æſtimationem tres acras*, Judgment was then arreſted for the Uncertainty of the Word *Peciæ.* 10 Mod. 140, 168.

The Plaint is only the *Pl'ito Tranſgr'* and ſhews no Damage, this is uncertain, it might be a Plaint for an Aſſault, it ſhould be *quare vi et armis clauſum fregit*, &c. *ad grave Damn' Quer'* as in Originals.

The

The Entry of the *Venire* is *per quos rei veritas melius Scire poterit* inſtead of *Sciri*, which always has been held ill in Caſes of inferior Courts. *Roll. Abr.* 803. *Plac.* 4. *Sid.* 406. *Vent.* 241. 3 *Keble* 128.

It has been a Controverſy whether *Tranſgr' quare vi et armis* will lie in an inferior Court.

Parker Chief Juſtice: That is an inferior Court or Court Baron, but this is a Court of Record.

Puckile pro Def. Pecia well enough, *Tranſgr' Cro. Eliz.* 339. was in Ejectment, and *Pecia* was held ill, becauſe the Sheriff could not tell what to deliver Poſſeſſion of.

Saund. 221. Avowry for taking Cattle in *quadam pecia terræ.* 2 *Saund.* 158. Indictment for not repairing a Highway *in, per et trans quandam peciam terræ.*

Scire is only falſe *Latin.*

Adjournatur.

Holmes and *Huſe.*

Roll. 462. Poſtea.

TRIN. 13 *Annæ R.* Judgment was reverſed for the Execution to the *Venire facias niſi, &c.*

Replevin out of the Court of the Honour of *Windſor*, one Defendant avows another, and makes Compliance, by Virtue of the *Stat. Car.* 2.

Car. 2. enabling the King to grant ſeveral Lands and Rents to Truſtees, in order to ſell, *&c.* for a Fee-farm due at *Lady-Day*, 10 *Annæ*, iſſuing out of divers Lands, whereof the *Locus in quo* is Parcel *infra Homagium de Orkingham parcell' manerii de Sunning in Com' Berks*; Bar that *R.G.* was ſeiſed, *&c.* and that the Rent was apportioned by Agreement; the Avowant demurred becauſe no Apportionment could be by parol Agreement.

Mr. *Reeves pro Quer':* We do not defend the Bar, but inſiſt that the Avowry is ill. 8 *W.* 3. it was held that an Avowry for Rent iſſuing out of *Locus in quo inter alia* is not good.

The Uncertainty is the ſame in this Caſe, and the Conſequence is, that it takes away the Plaintiff's Defence, for an Entry would ſuſpend the Rent, but it can be pleaded here.

Homagium is no Place, that Word has no other Signification, but that of the Service or the Jury in a Court Baron, *parcell' manerii de Sunning* will not make it more certain, for it does not appear whether thoſe Words relate to the Lands or the *Homagium*; neither is it ſaid whoſe Manor, and if it be a Manor of the Crown, 'tis not within the Act.

That the Truſtees *Seiſit' fuer' de uno annuali redditu* without ſhewing what, and ſome Sorts of Rents are excepted, of which this may poſſibly be one.

Seiſis'

Seisit' ut de feodo Reversion, it should be *Seisit'* of the Reversion expectant upon the Death of *Queen Dowager, ut de Feodo.*

Mr. *Whitacre contra:* It is sufficient for an Avowry that the Lands are shewn liable to the Demand of the Avowant, this is certain as rent issuing out of the *Locus in quo inter alia*, which has been often held well. *Rep.* 141. 2 *Saund.* 194. *Winch* 951. *Herne's Pleader* 744.

As to the Incertainty of the Place where the Lands lye, *Bale* and *May*, 7 *Annæ*, was
Co. Ent. 519. *Exonerat' ex (tal' terris) in Paroch' de D. et alibi in Com' præd'*, which was held well. But is certain enough, for *Homagium de Ockingham* may be a *Lieu Conus* a Place of that Name.

We have said that the Trustees were seised in Fee of this Reversion, which is all that is necessary by the express Words of the Statute, and the Manner of alledging that, if wrong, is at most but informal, and should have been shewn for Cause of Demurrer.

As to the Possibility of its being an excepted Rent, that should have been shewn on their Part if there be a general Clause, and then an Exception, it is enough for us to bring ourselves within the general Words, and he that would take Advantage of the Exception must shew it, as in the Case of Fines by Persons of *non sane* Memory and Wills. *Plowd.* 376.

The

The Clauſe of the Act about Bankrupts, 4 & 5 *Ann.* ſays, that ſuch Bankrupts may plead in general, *&c.* which is a relative Term, and yet general Pleading of *devenit decoctor* has been allowed without ſhewing the precedent Qualifications.

Reeves (Reply): *Bate* and *May* had greater Certainty than this, for the Manors where the Lands lie and whoſe they were was ſhewn, and the Uncertainty was only as to the Vills; but that bore much debate. *Hil.* 8 *W.* 3. *Fregan* and *Fletcher*, ſaid *per Holt* Chief Juſtice, that Avowry for a Rent-charge iſſuing out of ſuch Lands *inter alia* was ill. Sir *Moyle Finche's* Caſe.

They ought to have ſhewn this Rent not excepted, for the Exception is in the Purview itſelf, and does not come in a ſeparate Clauſe, but if it had, it might have been like the Caſe of the general Pardon, upon which the Rule is, that the Defendant muſt ſhew himſelf not within the Exceptions. *Hil.* 10 *Ann.* *Banks* and *Cutting*, upon Pleading the Act for Diſcharge of poor Priſoners, the Court held he muſt ſhew himſelf within it; ſo upon the Act for Amendment of the Law, in an Action upon Aſſignment of a Bail-bond, the Plaintiff muſt ſhew it a Bond aſſignable, and the Court will not put it upon the Defendant to ſhew it otherwiſe.

Turner and *Baile*, *Paſch.* 5 *Ann.* pleaded *debito modo exoneratus juxta Statut'* for diſcharging of Soldiers; the Court held this general Pleading ill. Q. *Turner* and *Lee.*

The Statute only intends to ſave them the Trouble of alledging the Seiſin in the King, and deducing the Title to the Truſtees by the Letters Patent, and therefore to begin, that the Truſtees ſeized by Virtue of that Act, but as to all other Matters they were left at Common Law, and muſt avow as in other Caſes for a Rent.

If we had traverſed the Seiſin of the Truſtees generally, and on Trial it had appeared that this Rent was contained in the Letters Patent, the Verdict muſt have been againſt us, though it was not comprized in the Act of Parliament, nor intitled to the Privileges given by it.

Parker Chief Juſtice: Here are two Acts in this Caſe; Firſt 22 *Car.* 2. *c.* 6. which ſpeaks of Letters Patent intended to be made, and excepts out of them certain Rents therein mentioned; the Second is 22 & 23 *Car.* 2. *c.* which recites that Letters Patent were made purſuant to the former Act, from whence it follows, that no Rents could be included in the Letters Patent that were excepted out of the Firſt Statute.

But as to your Objection that the Rent is not averred to be out of the Exceptions; ſuppoſe that had been done, the Reaſon of the Objection had notwithſtanding remained full as ſtrong, for poſſibly the Truſtees might have been ſeiſed ſome other Way, and then upon your Arguing the Iſſue muſt have been againſt you, but this can be of no Weight, for

no

no other Seiſin but *ſecundum formam Stat.* could appoint this Avowry, and conſequently, if that were not proved, the Iſſue muſt be againſt the Avowant.

Ulterius conſilium.

Domina Regina v. *Epiſcopum Peterburgi* and *Pettifer*.

PARKER Chief Juſtice delivered the Opinion of the Court, *viz.* This is a *Quare-impedit*, the Count ſets forth, that the Vicarage of *Blaxley* always has been and is preſentative, and a Benefice with Cure, and lately became void by the Death of *J. H. penult'* Incumbent, that *John Watts* then Patron preſented *John Dollifer (prædict' J. P. neque tunc nec unquam Diacono exiſten')* who was admitted, inſtituted and inducted; that within a Year after ſuch Induction he was not admitted to adminiſter the Sacraments, nor was ſo admitted at any Time before, *per quod vigore Stat.* he was *de facto* deprived, and the Vicarage became void, and remained ſo *in defec'*, *&c.* for a Year and a Half, and ſo continues, and upon this Lapſe the *Queen's* Title ariſes. *Quare impedit.* Count.

The Biſhop claims nothing but as Ordinary, and the Defendant *Pettifer* prays Judgment of the Writ; and ſays, that he is Vicar *Imperſonee* of the Preſentation of the ſaid *T. W.* who is alive, and not named in the Writ, and claims no otherwiſe, *unde ex quo prædict' J. W.* Plea.

non nominatur defend' in brevi petit Jud' de brevi illo, &c.

Replication. The Attorney General: *Replico quod bene et verum est*, that *J. P.* was Vicar *Imperſonee* of the Preſentation of *J. W.* but ſays, that the *Queen*'s Original iſſued *Carr' tiel jour & ann' prout, &c. quodque diu ante Eman' inde et poſt præſentacon' præd' J. W. per quoddam Scriptu' ſuum* granted the Advowſon to the ſaid *J. P.* and his Heirs, *abſque hoc quod prædict' J. W. die Eman' b'ris præd' fuit Patronus, &c. et hoc, &c.*

To this the Defendant demurred.

Note; the Queſtion ariſing upon the Plea, the Chief Juſtice took Notice of it in the Reply.

Queſtion. The Queſtion is, whether this Plea in Abatement by the Incumbent be good.

Objection to the Plea. It has been inſiſted for the *Queen*, that it is not good, and that the Defendant *Pettifer* ought to anſwer without the Patron, becauſe the Court admits his Preſentation to be good, and his Aſſiſtance is not wanted to defend the Incumbent, and ſo is *Theol' Dig' of Writs, Lib. 5. c. 19.* where the Differences upon the Writ as to this Point are ſtated. *Bract. Tract. 2 Lib. c. 6. fol. 246. b.*

Plea taken in two Senſes. It may be pretended that the Plea, as it ſtands here, may be taken in two different Senſes, *viz.*

Firſt,

First, That the Incumbent is in by the Preſentation mentioned in the Count.

Secondly, That he is in by a new Preſentation ſubſequent to this Avoidance.

I ſhall conſider it in both theſe Senſes; and firſt, if it be intended that *Pettifer* is in by the Preſentation in the Count; Conſidered in the preſent Senſe.

Then it is agreed on both Sides, that *Watts* is rightful Patron, and if there be a Vacancy it ariſes by Defendant's own Act, ſo that whether the *Queen* has a Right or not lies in his Conuſance, and the Patron has done nothing to diſturb the *Queen*'s Preſentation.

In order to ſet the Matter in a clearer Light, I would make ſome Obſervations upon the Nature of both the Writ and Plea in general, &c. General Obſervations on the Writ and Plea.

First, It is never neceſſary that the Patron ſhould be made a Party for his own Sake, but merely for the Sake of the Clerk, whoſe Right depends upon the Patron's Title.

Secondly, That a *Quare Impedit* differs from a Writ of Right of Advowſon in this, that the laſt lies againſt the Patron as Patron, but the firſt againſt a Deferrer only. 39 *H.* 6. 85.

Thirdly, He that brings a *Quare impedit*, can by his Writ ſuppoſe no Body to be Patron but himſelf, for that would be repugnant, and though the Count names another Patron,

yet it is not neceſſary to ſuppoſe him dead, in the Caſe of Lapſe. *Co. Ent.* 512, 514.

Fourthly, This is only a Plea for the Incumbent not the Ordinary, for he hath nothing to do with the Patronage, neither in Intereſt nor Dependency, nor are his Office and Acts joined to or depend upon the Patron's, as the Incumbent's do; ſo is *Hob.* 316, 317.

Fifthly, When the Incumbent pleads if he does not ſhew him to be rightful Patron of the Advowſon, but only his Patron, and that he is in by him, and therefore ought not to be ſued without him.

The proper Criterion to judge of this Caſe.

I would take it then along with me, that this is a Plea only for the Incumbent, as the true proper Criterion whereby to judge of it; at Common Law, no Body was admitted to plead to the Title of the Patronage, but one that made Title to it himſelf, and if the Patron was made Party, and would not come in or colluded, the Incumbent was without Remedy; but this was help'd by 25 *E.* 3. 6, 7. *pro Clero*, *Stat.* 3. which enables the Ordinary or Poſſeſſor to counterplead the Title in ſuch Caſe.

The Import of the Plea at Common Law.

The Import of this Plea at Common Law, as it was pleaded *ore tenus* at the Bar, was, I claim nothing in the Advowſon, all my concern is, that I am preſented by *J. S.* who is ſtill alive; whether you or he have a Right, I know not, but he does; and therefore he ought to

to be brought in to anſwer for that which he was to do, and which can properly lie in no Body's Conuſance but his own.

From hence appear the Caſes where this Plea is proper,

Marks of Caſes where the Plea is proper.

Firſt, The Incumbent's Title depends upon the Right of Patronage.

Secondly, That the Acts of the Incumbent are joined to the Patron's and depend upon them, the Patron makes himſelf a Diſturber by the Preſentation, and the Incumbent's Advantage of the Patron's not being brought in, is only becauſe he would not plead to the Title at Common Law, and therefore where his Right depended on the Title of Patronage, he ſhould have that Privilege in order to ſupply his Defect; the Diverſity taken in *Hall's* Caſe, 7 *Rep.* 25, 26. if conſidered with a View to the Ground, is right.

Hob. 316. and 7 Co. 25. but not ſo clearly ſtated in the laſt.

The Application of this Matter makes the firſt Objection to this Plea, *viz.* That the Patron's Right and Acts are not in Queſtion here, but admitted, and the Queſtion is only upon the Incumbent's Right upon his own Account.

1ſt Objection from hence.

Whoever pleads in Abatement of a Writ muſt ſhew how the Plaintiff may have a better Writ, and in order to make this Writ maintainable againſt the Patron, he muſt be a Diſturber, ſo that in whatever Want the Incumbent may be of the Patron's Aid, and

Hob. 107.

9 H. 6. 30.

though his Right appear to be in Queſtion, yet the Defendant cannot take Exception to the Writ, that he is not named, without ſhewing him a Diſturber, for otherwiſe the Plaintiff can have no Cauſe of Action againſt him, from whence ariſes the ſecond Objection, *viz.*

2d Objection. *Bract. Lib.* 7. *Aſſiſa uli' preſent.* 1 *H.* 5. 7. 22 *E.* 4. 4.

That the Patron's Preſentation being allowed, and the *Queen*'s Title ariſing from a Vacancy made by a ſubſequent Act of the Incumbent, the Patron is not ſhewn to be a Diſturber, and conſequently the Defendant has not given the Plaintiff a better Writ, for as yet this muſt be underſtood to be a Plea of the ſame Preſentation mentioned in the Count, and not a ſubſequent one after the Vacancy incurred, and that indeed it ſeems to be a Plea in Bar, and an Account to a Denial of Vacancy. 3 *Lev.* 206. *Lutw.* 1089.

1ſt Argument for Defendant.

But 'tis ſaid for the Defendant firſt, that the Preſentation upon this Vacancy belongs to *Watts* the Patron, and therefore he ought to be brought in to defend his Right.

Anſwer.

To this I anſwer, that it does not appear upon this Record, that the Right of Advowſon does belong to *John Watts*, for the Count only ſuppoſes him Patron, and the Defendant in his Plea ſays, he is Vicar *imperſonee* of his Preſentation, all which may be true, though he ſhould be only Grantee of the next Avoidance. *Heb.* 102. *H.* 8. 4. 15 *H.* 6.

But

But it cannot be of Service here to bring in the Patron, for it would not ſerve to defend the Incumbent's Title, which is impeached only on his own Account; ſo it is in the Caſe of Simony where the Patron is no Diſturber. But the King's Title ariſes on the ſimoniacal Contract.

Secondly, It is objected for the Defendant, that if the *Queen*'s Clerk be admitted upon Judgment in this Suit, the Patron cannot bring his *Quare impedit*, though the ſix Months be not paſt, or he had no Notice thereof, he ought to be brought in. 2d Argument for Defendant.

But this is *res inter alios acta*, and cannot prejudice the Patron, and the Writ to the Biſhop is only to admit the *Queen*'s Clerk *non Obſtante reclamatione Clerici*, and in either of the Caſes mentioned the *Queen*'s Preſentation will be void, and then (as in *Hob.* 302. and 6 *Rep. Green*'s Caſe,) it will be but a Collation of the Biſhop's, which makes no binding Penalty againſt the true Patron, but the Church remains void, and he may not only bring his *Quare impedit*, when he will, but alſo preſent upon him ſeven Years after.

It is the Inſtitution and Induction that works the Diſſeiſin, which cannot be in the Caſe of a Collation.

Noy 151. is inſiſted on, but that is an unintelligible Caſe as there reported; the Plea is ſaid to be in Bar, whereas it is in Abatement, 3 *Lev.* 206. I am not ſatisfied, that Caſe is Law,

Law, for it differs much from the Caſe in 3 *Lev.* 16. on the Authority of which it is ſaid to be adjudged, and the Reaſon given that it is a Preſentation *pro hâc vice tantum* is too large. In *Lutw.* 1089. the ſame Caſe is argued, but no Judgment of *Reſpond' ouſter* mentioned to be given.

The Concluſion from hence is, that this Plea is taken as relying on the Preſentation in the Count, of denying the ſubſequent Vacancy, is ill.

Plea conſidered in the ſecond Senſe.

Secondly, As to the other Senſe in which it may poſſibly be intended, *viz.* as admitting the Vacancy in the Count, and inſiſting on another Preſentation ſubſequent to it.

In this Senſe it might indeed have been made a good Plea, for poſſibly no Notice might have been given to the Patron, and then no Lapſe would incur, but then the ſpecial Matter ſhould have been ſet forth, he ſhould have confeſt the Vacancy, and expreſly ſhewn a new Preſenttion, for that would have made the Patron a Diſturber and given the *Queen* a better Writ.

Judgment.

This being a Vacancy made by the Incumbent's own Act, lying entirely in his Knowledge, independent of the Patron's Title, who is no Diſturber, the Incumbent is not intitled to his Aſſiſtance, but muſt anſwer over without him.

Jackſon

Jackſon and *Laverack.*

AFTER two Arguments at Bar, *Parker* Chief Juſtice delivered the Opinion of the Court. This is an Action on the Caſe wherein the Plaintiff declares, that whereas he is ſeiſed of twenty Acres of Land, and he *et omnes illi, &c. huer'* and *he're debuer' Co'am paſturæ in* 140 *acr' paſtur' vocat' Sikehouſe Moor*, the Defendant incloſed 100 *acr' terræ parcell' Co'iæ paſturæ præd' vocat' Sikehouſe Moor, per quod, &c.* Antea 13.

Here has been a Verdict and Judgment in the Common Pleas, and it came before us by Writ of Error, the Error aſſigned is, that the Charges in the Declaration are repugnant, non-ſenſical and impoſſible; for that *Communia* ſignifies a mere Right, and cannot be incloſed with Fences, *&c.* and this is ſupported by other Parts of the Count, where the Plaintiff has uſed the Word *Communia* to ſignify the Right. Another Objection is, that *Sikehouſe Moor* is ſaid to contain 100 Acres of Paſture, and then that the Defendant incloſed 100 Acres *Terræ parcell' Co'iæ paſturæ præd'* which is repugnant.

But we are of Opinion that though this be not ſtrictly right, yet it is well enough, and may be underſtood after a Verdict; *Co'ia* taken in a ſtrictly proper Senſe does indeed ſignify the Right, but in an improper Senſe, to which

How Words in Count ſhall be taken after a Verdict.

which it has been drawn by Uſe, it ſignifies a Place as it ſtands; here it cannot be taken in its proper Senſe, for that, as is objected, would make the Declaration repugnant and impoſſible, and therefore it ſhall be underſtood in the improper Senſe rather than the whole be made Nonſenſe.

In two Caſes *C. B. viz. Rich* and *Moor*, *Mich. 5 Ann.* and *Rich* and ——— *Trin. C. A.* Commoner avowed for diſtraining the Beaſts of a Stranger *Damage feaſant*, and laid it *Dam' in Co'ia ſua præd' ſic facien'*, without alledging *per quod* he could not enjoy, *&c.* and the Court held it was nought, and that the Words *Damnu' in Co'ia ſua* would not help it no further than if he had ſaid *ibidem* in the uſual Form, and ſignified only the Place.

The ſame anſwer will ſerve to the other Objection upon *terræ* and *paſturæ*; for the *terra* ſtrictly ſignifies only arable Land, yet generally it takes in all Sorts of Lands.

This being after a Verdict, which has no great Force to help want of Certainty, tho' ſome Judges have called it the *Almighty Power* of a Verdict, we think it is well enough, it is laid with a *per quod* he could not enjoy his Common, *ad damnum ſuum*, and therefore a Damage muſt have been proved, and I do not know, but that if it had been only that the Defendant incloſed 100 Acres, *per. quod* he could not enjoy, *&c. ad dampnum ſuum*, it might

might have been ſufficient after the Jury had found it.

For theſe Reaſons the Judgment muſt be affirmed.

Seſton v. *Libbard.*

Declaration upon Aſſignment of a Bail Bond *juxta Stat.* 5 *An.* c. 16. *ſect.* 10 Mod. 190.

IN Debt brought by the Aſſignee of a Bail-bond upon the Statute 5 *An.* c. 16. *ſect.* the Defendant demurred to the Declaration.

Mr. *Branthwaite* for the Defendant took three Exceptions.

Firſt, That it is only ſaid a Writ of *Latitat* iſſued, without ſhewing the Return.

Secondly, That the Breach of the Condition is not averred, but brought in by Way of a Recital.

Thirdly, That in the Breach it is only ſaid *Non comp'uit juxta Exigenc' b'ris præd' ſecundum forma' Condi'con'*, which is Matter of Judgment and Concluſion only.

To ſupport the ſecond he cited *Cro. Eliz. Palmes* v. *Epiſcopum Peterburg' in Quare impedit*; the Defendant pleaded that he demanded of *J. S.* the Preſentee of the Plaintiff to ſee his Letters of Orders, *et pro eo quod* he did ſhew them, but went away and did not come again in ſix Months, *per quod* a Lapſe incurred, &c. and this was held ill on Demurrer,

murrer, *quia pro eo quod* is not Averment but Recital.

Cro. Eliz. 441. *Transgr' quare clauſum fregit*, the Defendant juſtified for a Way by Preſcription, *et quia* the Plaintiff *obſtruxit duas januas et tres perticat' ſepium in viis præd' Def. januas fregit*, adjudged ill on Demurrer, for *et quia* is no poſitive Averment.

2 *Jones* 197. *In Transgr'* and Aſſault, the Plaintiff declared *quia cum Def. inſult' fecit*, and held nought on Demurrer, *quia* Recital, 2 *Lev.* 206. the ſame Point.

To maintain the third Exception, he cited *Lev.* 145. Debt upon Bond, the Condition was to deliver all ſuch —— as he had received at ſuch a Day, the Defendant pleaded a Delivery *ſecundum formam conditionis*, and on Demurrer held ill, *quia* he ought to have pleaded it in the very Words of the Condition, and not by Way of Judgment and Concluſion, 3 *Lev.* 243. ſo in the Common Caſe of Debt upon a Bond conditioned to pay Money at a certain Day.

Mr. *P. Williams contra.*: Nothing is requiſite in this Action, but that the Plaintiff ſhew himſelf a good Aſſignee upon the Statute, and the reſt ought to come on the Defendant's Part.

Eyre Juſtice: This differs very much from the Caſe of an Action by the Sheriff himſelf, for that is on the Obligation, the Foundation of

of this is the Default of performing the Condition, for the Words of the Statute are, if ſuch Bond ſhall be forfeited the Plaintiff may bring his Action, and therefore it muſt be expreſly ſhewn by the Plaintiff. Caſes of Treſpaſs are to the Purpoſe, for this is a Matter traverſable in *Aſſumpſit*, it is *cum indebit' fuit et ſic inde indebit' aſſumpſit*, &c. and has been held good on this Reaſon, that the Action is upon the *Aſſumpſit*, which is a ſeparate Sentence from the *Indeb'*.

Parker Chief Juſtice: I take that to be all the ſame Sentence under the *Cum*, and all that is directly alledged in *Aſſumpſit* is the Breach.

In this Caſe you muſt ſhew it a Bond aſſignable by that Act, and then it will neceſſarily appear to be a Bond upon Condition, and then certainly there will be no Cauſe of Action on the Face of the Declaration, unleſs a Breach be alledged, *Hob.* 14. *Norton* and *Turner's* Caſe, 8 *Co.* but *quære* whether this be not as proper an Averment of the Breach here, as of making the Bond in a Common Action on a Bond, *viz. quod cum per quoddam ſcriptum ſuum ati' conceſſ.* &c. which is notwithſtanding traverſable, ſo that is not a concluſive Argument, this Allegation ſhews it to be a Bond abſolute, and then the Jet of the Action is on the Payment of the Penalty, as in other Caſes,

But the Return of the Writ is not ſet forth, and without that, it cannot appear to be a Bond

Bond taken by Virtue of that Writ, and consequently assignable within the Statute, then it is said *non comp' juxta exigen' b'ris secund' forma' Conditionis*, now they might differ from any Thing here alledged, and the Defendant might appear according to the Demand of the Writ though not according to the Condition.

Powys Justice: *Def. non comp' per quod acc'o accrevit quer'*, so that the Action is founded on the Non-appearance.

Johnston v. *Altham.*

Plea in Abatement to the Declaration and Judgment final. 10 Mod. 192, 210. Post.

ERROR of a Judgment in *C. B.* in an Action on the Case by Bill against an Attorney, the Defendant *petit Jud' de Narr'*, and pleads no Bill was filed to warrant the Declaration; *Et hoc, &c. unde petit Jud' de Narr' et quod Narr' cassetur, &c.* Plaintiff replies, *quod Narr' cassari minime debet, &c.* and thereupon final Judgment was given.

N. B. This Record is entered on the 140 Roll of last Easter Term.

Mr. *Dee* assigned for Error, that the Judgment should have been only *Resp. Ouster*, this being a Plea in Abatement, and cited the Case of *Medina* and *Stanton*, *Trin.* 12 *W.* 3. *Roll.* 215. where *petit Judicium de Narr'* was held a Conclusion in Abatement.

But there is a great Diversity between this and other Pleas in Abatement, arising from the Matter of the Plea itself, it is that there is no Bill, and therefore he would not crave *Judicium*

Judicium de Billa, for that would be a Contradiction, neither could he pray it *de ac'cone*, for it is not Matter in Bar.

Mr. *Reeves pro Def.* The Want of a Bill is not Matter of Abatement but Irregularity, and may be aſſigned for Error, but ſuppoſe it were in Abatement, the proper Concluſion had been *petit ſi reſpondere compelli debeat, &c.* but *Judicium de Narr'* has been always held to be in Bar, and this appears by the Concluſions of Demurrers, which muſt be in Bar.

Brownl. R. 2. pl. 6. There can be no ſuch Thing as a Plea in Abatement to the Declation, but it muſt be to the Bill or Original.

Alliſon v. *Manucap. de Gale.* A Replication in Bar was put into a Plea in Abatement, and it was held a Diſcontinuance.

Goodall and *Edwards*, *Mich.* 10 *Annæ*, held that where the Defendant *petit Judicium de Narr'* it is a Plea in Bar, and *de brevi* is Abatement.

And when a Variance is pleaded between the Writ and Count in Bar, which ſhould be Abatement, the Plaintiff ſhould have Judgment in chief.

But here is an Iſſue in the Caſe on the Record which has been tried by the Court, and therefore the Judgment ſhould be in Chief, never doubted but if that there be an Iſſue on a Plea in Abatement, and Trial *per*

patriam, Judgment muſt be final, and this does not differ. *Sid.* 252. 1 *Lev.* Held upon an Iſſue in Abatement, Judgment muſt be final on a Demurrer to Evidence, ſo that Trial *per patriam* not neceſſary.

Dee: There are many Caſes where Want of a Bill on the File has been held pleadable in Abatement, there is great Difference between Trial by the Court and *per pais*, for the Jury can enquire of the Damages after the Iſſue in Abatement is determined, but the Court cannot.

Parker Chief Juſtice: I ſuppoſe it to be an Action of Debt, the Jury cannot examine the Merits in that Caſe.

The Conſideration of the Merits is not the Rule, whether there may be Judgment or not, for it muſt be firſt ſuppoſed that there may be Judgment final before the Jury can go into that, the true Reaſon ſeems to be the Delay the Plaintiff has ſuffered, which he does not in a Trial by the Court, which is by immediate Inſpection of the Record.

Eyre Juſtice: The Matter of this Plea is certainly proper for Abatement, but the Queſtion is, whether the Prayer *de Narr'* make it in Bar, ſurely *Concluſio facit placitum.*

Parker Chief Juſtice: The Reaſon why *Petit Judicium de Narr'* has been generally held to be in Bar, is becauſe by pleading to the Declaration, he ſeemeth to admit the Original

ginal or Bill, which is the Beginning of the Suit, to be good, but in the Caſe at Bar there is no Bill, and therefore this ſeems a proper Plea to the Beginning of this Suit, which wants the right Commencement of a Bill.

Eyre Juſtice cited *Croſs* and *Billſon*, *Hill.* 2 *Annæ*, *Rot'lo.* 46. and *Bond* v. *Barns*, *Mich.* 4 *Annæ*, whereupon "*Another Action depending*" pleaded in Abatement. It was held, that if the Plaintiff replies to Iſſue, he ſhall *pet' Judicium de Damn'*, *quia* he is to have Judgment final, if the Iſſue be determined for him.

Ulterius conſilium.

Mr. *Dee* took an Exception to the Writ of Error for Variance, the Writ is directed *D'no Thomæ Trevor*, and the Record returned *in Pl. Commun. Tho. Trevor Milite*, the Court inclined to think it was a Variance, *et adjournatur.*

Quære as to what Mr. *Reeves* ſaid of the Concluſion *reſpondere* (which is the conſtant Term) *compelli non debeat*, for that muſt have been *(ad Billa' reſpondend')* and ſo would have been equally repugnant to the Matter of the Plea, as *petit Judicium de Billa.* *Qu.* likewiſe as to the Reaſon of the Difference taken by the *Ch. Ju.* between Trials *per pais* and by the Court on Pleas in Abatement; and whether that be not rather upon the Rule, *Patria non debet laboribus vexari*, than upon the Delay. *Quære tamen.*

Read v. *Smith.*

Action *ſur Caſe v.* Common Carrier.

IN Caſe againſt a Common Carrier, three ſeveral Counts were laid, and entire Damages given.

Mr. *Reeves* moved to arreſt the Judgment, for that in the third Count the Defendant was not ſhewn to be a Common Carrier; or that he carried Goods for Hire, nor any ſpecial Undertaking in this Caſe; the Words were *Deliberavit Def. Car' Rhedar'*, *Anglice* Stage Coachman, and *veſter Banor' pro Carriacon' Bon' in Rheda ſua præd'*, he cited * *Coggs* and *Barnard*, *Trin.* 2 *Annæ*, *B. R.* where it was much debated whether good without Hire; but was held ſo at laſt, *quia* there was a ſpecial Undertaking laid.

* 2 Ld. Raym. 912. Comyns 133. Salk. 26. 3 Salk. 11, 268. Holt 13, 131, 528.

See 4 Vin. Abr. P. 6. pl. 4. 5. 6. 7. Stat. 30 Geo. 2. c. 24. for preventing the unlawful pawning of Goods, &c. and 2 Stra. 1099.

Parker Chief Juſtice ſaid, that the Declaration being introduced with alledging, that he was a Common Carrier for Hire; that Deſcription extended not only to the firſt Count, but throughout the Declaration, like the Deſcription of the Plaintiff in an Action for Words; *Et per totam Curiam Judicium pro Quer'*.

Domina

Domina Regina v. *Illing Gaoler of Hertford.*

Attachment of Contempt for letting the Defendant on an *Excom' cap'* go at large, denied.

REEVES and *Harding* Chief Wardens libelled againſt *Bunn* in the Spiritual Court, for a Rate, and had a Sentence for the Caſh and Coſts, whereupon *Bunn* was excommunicated, and taken upon a Writ of *Excom' cap'* and committed to the Defendant's Cuſtody, who afterwards let him go at large upon the Diſcharge of *Reeves* only; and now Serjeant *Cheſhire* and Mr. *Whitaker*, of Counſel for the the other Churchwardens and the Pariſh, prayed an Attachment againſt the Gaoler for his Misbehaviour, they inſiſted that the Releaſe of one Churchwarden is not ſufficient, becauſe they ſue for the Church-Rate in a corporate Capacity for the Goods of the Church, and for this cited *Yelv.* 172. *Noy* 129. 2 *Brownl.* 114. 2 *Keble* 317, 391. That this was as a voluntary Eſcape, for which they could have no Remedy but by Attachment, for that they could not have an Action notwithſtanding the Reſolution in *Lutw.* 121. that the Writ was made returnable here, that the Court might take Care of the Execution and puniſh the Defaults of Officers, as appears by the Preamble of the *Stat.* 5 *Eliz. c.* 23. The Caſe of *Gillum* and *Atkinſon*, *Mod.* 26. was cited, where a *Fieri facias* iſſued to the Sheriff, who returned *Clericus, &c. nullum habens laicum feod'*, and thereupon a Sequeſtration went to the Biſhop, who obſtructed him in the Execution of it by

Rol. Rep. 426.

the Tenants, and the Court granted an Attachment againſt them for the Contempt.

A Day was given to ſhew Cauſe, and Mr. *Dunch* for the Gaoler read ſome Affidavits in Excuſe of the Fact, and as to the Matter of Law inſiſted, that they were not proper to come to this Court for a Remedy, but ought to go to the Chancery, that the ancient Remedy was to have a Writ *de Excom' recap'* out of Chancery, and to command the Sheriff to anſwer the *King* in his Bench for the Contempt.

Writ *de Excom' recap.*

F. N. B. 64. That the Writ *de Excom' cap'* is an Original of the Court of Chancery, and the *Capias* which iſſued hence is only Meſne Proceſs upon it, and when the Defendant is taken he is a Priſoner to the Court of Chancery, and this Court has nothing to do with the Body by the expreſs Words of 5 *Eliz. c.* 23. *par.* 3. Upon Abſolution or Tender of Caution, the Writ *de Corp' deliba'cone et de Cautione admittenda* iſſue out of Chancery, *F. N. B.* 63. *a.* he concluded from hence, that if this were a Contempt it was ſo to the Court of Chancery, and ought to be puniſhed there.

That this is a Writ of *ex gratia* in Aid of the Eccleſiaſtical Courts, and before 5 *Eliz.* was not returnable, but the Sheriff kept it in his Hands, and by that Act this Court have a new Power given them over the Writ, but not over the Body.

As

As to the Objection of Want of Remedy, he answered that there could be no Reason from thence for the Court to proceed to punish in a summary Way, for they might have an Action of Escape against the Sheriff, and upon that the Question would come properly, whether the Discharge of one Churchwarden were good, *Lutw.* 121. or the Parish might sue *Reeves* for an Account of Parish Monies in the Spiritual Court, and charge him with the Money, *March* 72. and it would come within the Rule, where the principal Cause is of Ecclesiastical Cognizance, and a temporal Incident arises, that Court may hold Plea of it; that this Act of *Reeves* discharging *Bunn* is equivalent to a Wasting of the Parish Goods, for which they might have an Action, *quia* they have thereby lost their Remedy. 2 *Roll.* 126. 3 *Bulstr.* 264. That the Case of *Gillum* and *Atkinson* differed from this; a *Fieri facias* is the antient and undoubted Process of this Court founded on a Judgment here, and it was held the Sequestration was of the same Nature, and the Bishop is Ecclesiastical Sheriff, and must return *Fieri feci*, and not *Sequestrari feci*, and therefore the Contempt in that Case was the same as hindering a Sheriff in the Execution of his Writ.

13 H. 7. 10. Bro. Tit. Gardens d'Eglise, 4. 5. 6.

Cheshire and *Whitaker contra*: That if the Party had been in Custody upon the first Writ, it had been proper to apply to Chancery, but this was Mesne Process issuing hence, awarded upon a *Non est invent'* returned on the first Writ, and in Chancery it would be objected, that it was a Contempt of this Court.

In the former Caſe there might be a Writ *de Excom' recap'*, but in this it would be but going in a Circle between the two Courts.

That this is not a Writ *ex gratia*, before the Conqueſt, the Civil and Eccleſiaſtical Courts were the ſame, and the Biſhop ſat with the Aldermen till *W.* 1. divided them, *(Seld. Eadmerus)* and now *Gladius gladium juvabit. Bract.*

This in *Lutw.* 121. was an Action brought by a natural Perſon in his own Right, the Churchwardens are only Truſtees for the Pariſh, and cannot bring any Action.

That the Eccleſiaſtical Court would not give any Remedy againſt *Reeves*, for the Proceeding there would be an original Suit in Matter of temporal Cognizance, and not within the Rules of temporal Incidents, from which Mr. *Dee* would argue.

That in the Caſe of *Ruſſell con' Ruſſell*, 20 *July* 11 *Annæ*, the Lord Chancellor granted an Attachment againſt the Officer for an illegal Diſcharge on the firſt Writ.

Juriſdiction of the King's Bench over Writ of *Excom' cap.*

Parker Chief Juſtice: Though this Court is to ſee to the Execution of the Proceſs for a particular End, yet the Defendant ſeems to be in Execution on the firſt Writ, and entirely at the Diſpoſal of the Court of Chancery, the Sheriff is not obliged to bring the Body in here at the Return, our Power is only to order the Taking and Commitment, and we cannot diſcharge,

diſcharge, and therefore the Court which has Power to diſcharge him regularly, ſeems proper to examine and puniſh the Irregularity of a Diſcharge; we cannot examine whether a Writ iſſued out of Chancery for his Delivery, or if it did whether regular or not, in the Caſe of *Fieri facias* from hence no other Court would have Juriſdiction. A Writ of *recaption* ſeems as proper now as before the Statute; I do not ſee why an Action may not be brought by the ſucceeding Churchwardens, and laid *ad damnum Parochi'orum.*

Eyre Juſtice: In the Caſe of *Fowler* and *Davis*, the Court were of Opinion that they might judge of a Writ and quaſh it, and that would be a Diſcharge, and we may ſuperſede it if regularly iſſued, ſurely ſince it is returned here we may judge of the Execution of it whether the Proceſs be abuſed.

But I think an Attachment is not a proper Remedy in this Caſe, that in *Ruſſell* and *Ruſſell* in *Canc'* was a plain Abuſe of the Proceſs by extorting Money, *&c.*

The Caſe of *Starkey* in *Yelv.* 172. is very looſely reported, and *Brownl.* 215. in the ſame Caſe it is ſaid, the Conſultation was granted upon the Point of the Releaſe being of Eccleſiaſtical Conuſance.

The Queſtion is, whether a Releaſe by one Churchwarden be good, and conſequently, whether this be an Eſcape or not; this is a Point as yet unſettled, and not fit to be determined in a ſum-

a ſummary Way by Attachment. *Judicial Reg.* 67.

The Writ of Recaption ſhews it was not the uſual Courſe to grant Attachments, a *Cap' utleg'* is for Contempt as well as the Debt, but never knew an Attachment iſſued out for letting the Defendant go.

I cannot ſee why a Churchwarden may not be made accountable for the Money in the Eccleſiaſtical Court, if he has not diſcharged it.

Powys (accordingly): That no Attachment ſhould go, but thought this Court being to ſee to the Execution of the Proceſs, whatever tended to elude it was within their Conuſance.

Parker Chief Juſtice: I admit we cannot quaſh or ſuperſede the Writ, but my Doubt was only whether, in Caſe all be originally right, we can do any Thing towards the Diſcharge of the Party.

This Court diſcharged the Rule.

Nota; *Parker* Chief Juſtice ſeemed to think that ſuppoſing *Bunn* had made Satisfaction to the Pariſh, and the Diſcharge had been by both Churchwardens, yet he would not be legally diſcharged 'till he had ſatisfied the Church for the Contempt, and being abſolved; *quod dubitat' per Eyre, quia* the Duty to the Pariſh is the Foundation; the Court likewiſe doubted

ed whether they could take Notice of the Gaoler as their Officer, being only Servant to the Sheriff.

Turner v. *Gethin.*

A Prohibition was denied, becauſe prayed upon the Citation only, *quia* before Libel it cannot appear what will be the Queſtion; ſo adjudged in the Caſe of *Tranſor* and *Watſon*, *Trin.* 10 *Annæ*. Prohibition denied before Libel. Poſtea.

Howel and *Gough.*

ERROR of a Judgment in *C. B.* Exception was taken that the Record was not removed, the Writ being directed *Thomæ D'no Trevor*, to certify a Record *quod reſidet* [illegible] *vobis et ſociis v'ris*, &c. and the *Pl'ita* is *Coram Thomæ D'no Trevor, Baron' de Brombam*, that Baron of *Brombam* is Part of the Name, ſo that it is a Variance, and the Court cannot take Notice that *T. D. T.* and *Thomas D. T. B.* of *B.* are the ſame. Variance between Writ of Error and Record. Name of Dignity.

Reeves contra: If the Writ were directed *D'no Trevor cap. Juſtic' de Banco*, and returned *Tho' D'no Trevor* would be well, tho' *Thomas* be a Part of his Name, for the Deſignation of Chief Juſtice aſcertains it, becauſe there can be but one, a Grant to *Tho' D'no Trevor* would be well, the Title of Baron was not anciently a Part of the Name, for Writs of Sum-

Summons of Barons to Parliament were often by the Name of Knight and Eſquire.

Whitaker contra cited 8 *H.* 6. 9. *b.* 21 *E.* 4. 71. *b.* *Fitz. Tit. Brief* 163. *Countess de Rutland's* Caſe, 2 *Inſt.* 66. *D'na Regina* v. *Colonel Hamilton*, the Defendant was indicted for the Murder of *Charles* Lord *Mohun*, and Lord Chief Juſtice *Trevor*, *Lit. Powys* and *Price*, Juſtices of *Oyer* and *Terminer* at the *Old Bailey*, quaſhed the Judgment, becauſe Baron of *Oakhampton* was a Part of his Name, and omitted, and a New one was immediately found with that Alteration.

Eyre Juſtice: The Title makes a Part of the Name in all Creations by Patent, for the Name is expreſly granted; otherwiſe in Caſe of Baronies by Tenure, and by Writ. *Seld. Titles of Honour* 616. 32 *H.* 6. 36. *b.* The Difference between Earls and Barons is argued *Style* 254.

Adjudged *per Holt et tota' Curia'*, in the Biſhop of *Cheſter*'s Caſe, that if an Eſquire was knighted, his Squireſhip merged, and a Grant by the Name of Eſquire would be ill.

Labbire v. Sir *John Germaine*, *Paſch.* 2 *Annæ*, he was ſued by the Name of Knight, whereas he was Knight and Baronet, and it was held that Baronet was a Part of his Name, and for Want of it the Plaintiff prayed to quaſh his own Writ.

Powys

Powys Juſtice took a Difference in Creations of Dignities, that in ſome the Name is not ennobled, as *Charles Montague* Lord *Halliſax*, and there the Title is Part of the Name, in others the Name is ennobled as *Tho.* Lord *Trevor* Baron of *B.* and there it ſeems, that *Thomas* Lord *Trevor* is only the Name.

Parker Chief Juſtice: It is fit to be conſidered whether he may be Baron of *Bromham*, without having that Parcel of his Name, if it may be good any Way, we are to take it that Way, and not ſuppoſe it wrong, if we cannot take Notice how my Lord *Trevor*'s Creation was. (2 *Cro.* 341. 2 *Bulſtr.* 167.)

Adjournatur.

N. B. The ſame Exception was taken *inter* * *Poulſon* and *Tranſhaw*, and moſt of the Writs of Error this Term. * Poſt.

Smith v. *Boheme.*

ERROR, Judgment in *C. B.* upon a Note to pay 72 *l.* upon Demand for Value received, or render the Body of *A. B. &c.* to the *Fleet* before ſuch a Day, laid upon the *Stat. of* † *Promiſſory Notes.*

2 Ld. Raym. 1362. See 2 Ld. Raym. 1396. 8 Mod. 362. † 3 & 4 An. c. 9.

Serjeant *Richardſon* for the Plaintiff in Error, aſſigned for Error, that this Note being to become Surety for a Debt only upon a Contingency, was not within the Statute, which deſigned only

only to give a Currency to Notes abſolutely for Money.

That it cannot be made at Common Law, for if a Man will bring his Action upon a Statute, he muſt rely upon that Title, and cannot aſſiſt it by reſtoring back to Common Law. 9 *Rep.* 74. *Noy* 147.

Serjeant *Cheſhire contra:* The Intent of the Act was only to make the Note in Nature of a Specialty, and ſerve inſtead of an expreſs Conſideration, and there will be no Reaſon to diſtinguiſh this from the Common Caſes, for at firſt it was only a Note payable within ſuch a Time after Demand, and now the Defendant has not rendered, that it is out of the Caſe, and it muſt be taken as an abſolute Note for the Money.

But ſuppoſing it to be out of the Statute, it will be good at Common Law, *pro valore recepto* imports a Conſideration, *Aſſumpſit pro opera et labore facto* makes a good Conſideration, ſo *pro præmiſſ.* 2 *Lev.* 153. and the Mention of the Statute will not hurt. *Vent.* 103. An Action for taking away his Wife *contra formam Stat.* was held well, though no Statute in the Caſe, and thoſe Words were rejected.

Richardſon (Reply): This agreed not to be an indorſable Note from the Time of making it, which is the Intention of the Statute, and nothing ſubſequent can make it ſo.

Pro

Pro valore recepto: Here is no Averment of Conſideration, but only a Recital that there is ſuch a Note.

As to the Caſe in *Vent.* there is a Difference between the Mention of a Statute where there is none at all, and where there is one, but the Plaintiff has miſtaken his Caſe upon it.

Parker Chief Juſtice: It is not laid that he made ſuch a Note for Value received, which is only a Recital of the Words of the Note, and then comes *fuit onerabil' vigore Stat. et ſic onerabil' exiſtens in conſ' inde ſuper ſe aſſ.* ſo that the Chargeableneſs by Force of the Statute is made the Conſideration.

Eyre Juſtice *accordant:* The Statute intended only to make Notes for Money negociable for the Eaſe of Merchants; ſuppoſe a Declaration were on *Indebit' Aſſumpſit* generally *pro opere et labore fact'*, I Queſtion whether it would be good.

Adjournatur.

V.

MOVED to ſet aſide the Execution of a *Scire fieri* Inquiry, becauſe the Defendant had no Notice of it. *Scire fieri* Enquiry, Notice of Execution.

Mr. *Clark* certified, that it was the Rule of the Court not to give Notice; but *Parker* Chief Juſtice ſaid it was fit to be allowed, becauſe

becauſe Natural Juſtice requires, that a Man ſhould not be charged of his own Eſtate without Notice, that it had been the Rule of the Common Pleas, but they altered it upon Conſideration.

Eyre and *Powys accordant:* But agreed that the Plaintiff ought not to ſuffer, and therefore it was ſet aſide upon Payment of Coſts, and a general Rule was made, *viz.*

Regula Generalis. That Notice ſhall be given to the Defendant of the Execution of *Scire fieri* Inquiries, as in the Caſe of other Writs of Inquiry.

Sed quære as to the Reaſon given for this Alteration, for *Sci' fi'* Inquiries differ much from other Inquiries, becauſe after the Inquiſition taken, the Sheriff is to warn the Defendant to be in Court at the return Day, *ad oſtend' ſi quid pro ſe he'at et quare Execu'con' non de bonis propriis*, and then he may traverſe the finding of the Jury, ſo that he could not be charged without an Opportunity of defending himſelf; ſo it was judged in the Caſe of *Forteſcue* v. *Northcott*, *Hil.* 3 *Annæ*, *B. R.*

Dunsfold

Dunsfold Inhabitants v. *Dunsfold Windſborough Green Inhabitants.*

Order of Removal of the Wife and Child to the Place of the Wife's Settlement. Fol. 370. Forteſc. 314. Caſ. of Set. & Rem. 31. Andr. 307. Stra. 554. Seſſ. Caſ. 53. 80, 97, 104. 2 Seſſ. Caſ. 110, 115, 185, 323.

TWO Juſtices made an Order to remove the Wife and Child of ſeven Weeks old, of *Archibald Player*, to the Place of the laſt legal Settlement of the Wife, the Huſband being a *Scotſman* now at *Dunkirk*, and not having gained a Settlement any where in *England*, which was confirmed by the Seſſions. And now Mr. *Whitaker* took Exception to it, that this is a Removal of the Wife to a Place where the Huſband cannot be removed, which will make a Separation. By the Common Law the Man is ſettled in the firſt Place he comes into, and by the Statute 39 *Eliz. c.*—*Scotſmen* are to be ſent to the Borders; thus upon this Order the Huſband will be legally ſettled in one Place, and the Wife in another, which will have the Effect of a Divorce.

That for ought appears in this Order, the Huſband may be ſettled in *Wales*, for *England* is only mentioned.

Contra: It does not appear that the Man was ever in *England*, ſo there is no Reaſon to preſume contrary to the ſhewing of the Juſtices; the Rule is, that if a new Settlement be gained by the Marriage, that deſtroys the old one, otherwiſe the old one continues, for eve-

ty Perſon born in *England* has a Settlement, and if he has gained no other, it is the Place of his Birth. *Int'* * *Dolting* and *Stockelane*, *Hil.* 11 *Annæ*, adjudged that if a Perſon was ſettled in *A.* and afterwards ſerved a Year according to the † Statute in *B.* being a Place in which no legal Settlement could be gained, the Settlement at *A.* continued; *Wales* is included under *England*, and ſo taken in all the Statutes ſince the Union, and ſometimes before; ſo in a Suggeſtion for a Prohibition to *Wales*, *Anglia ſſ.*

* Andr. 72, 208, 314. Forteſc. 219. Fol. 141. Seſſ. Caſ. 20.

† 13 & 14 Car. 2. c. 12. ſect. 21.

Parker: The Juſtices need not ſet forth any Reaſon of their Judgment, therefore a *Non ſequitur* will not vitiate, though if a Reaſon be ſhewn which concludes the contrary Way, it will, the Huſband might be a Vagabond, and then he had no Settlement, the Child muſt go with the Mother being a Nurſe Child.

Et ſic per Cur' ord' confirmentur.

Collins v. *Harvey.*

Prohibition. Libel by a Clergyman for Defamation.

PROHIBITION was prayed to the Eccleſiaſtical Court of *Wincheſter*, in a Suit by a Clergyman for Defamation, *viz.* "You are a Rogue, a Raſcal and a Liar, and "never ſpeak Truth but in the Pulpit."

Mr. *Williams* ſhewed Cauſe againſt the Writ, that theſe are Words of Spiritual Defamation and within the Eccleſiaſtical Juriſdiction, *Linwood* 356, 303. *Conſtit. Longton & Peckham*,

Peckham, *Stat. de circumſpecte agatis* & *Articuli cleri*, confirm the Eccleſiaſtical Juriſdiction in Matter of Scandal, *Reformac' Linguum Tit. Defama'con'*, *mod. Warſeley's* Caſe. *Keyling* ſays, the Spiritual Courts are Judges what are Words of Heat.

This is a Defamation in reſpect of his Office of a Miniſter, the Mention of the Pulpit ſhews he had the Office in his View, and the Exception of that ſhews he intended to take in other Parts, for preaching is but a ſmall Part of a Clergyman's Duty; by the Canons they are enjoined to go from Houſe to Houſe to admoniſh their Pariſhioners, to confer with Recuſants, and if the Reputation of their Veracity be taken away, they will be capable of doing little good that way.

Collins and *Jeffop*, 3 *Annæ*. Held that a Libel would lie in Court Chriſtian for kicking a Clerk, becauſe of the Reverence due to his Character.

Bract. cap. de Excep'con', *fo.* 406, 407. 3 *Lev.* 17. 4 *Inſt.* 332. *Roll. Abr. Drake's* Caſe. 2 *Roll. Abr.* 295, 297. 3 *Lev.* 18, 119. *Littleton's Rep.* 217. 2 *Lutw.* 1053. "Thou art a pitiful pimping Raſcal;" a Prohibition iſſued, but a Conſultation was granted.

Sir *Peter King contra*: The Conſultations prove too much, and give the Eccleſiaſtical Court a Juriſdiction in all Caſes of Scandal whatſoever, but they were never allowed the

Reformac' Legum, was puniſhed in *E. C*'s. Time, but never had the Sanction of a Law.

2 *Roll. Abr.* 295. has been denied to be Law, and Prohibitions have gone where a Clergyman has been called *Knave*.

Rule of Defamation, Words ſuable in the Spiritual Courts.

The Rule, upon which all the Caſes have gone, is where a Perſon is charged with a Crime puniſhable in the Eccleſiaſtical Court, a Suit will lie in that Court for the Defamation, and there is no Difference between Clergy and Laity as to this. *Sid.* 390. *Vent.* 2. *Keb.* 436. 2 *Roll. Abr.* 297. *Hob.* 860. 3 *Keb.* 28. *Mor.* 607.

Hil. 7 *Annæ*, *Clark* and *Price*, ſaid of a Clergyman, "*Price* behaves himſelf proudly "and impudently, and is an impudent Block-"head, his Advices, Exhortations, and Spiri-"tual Directions are not to be taken, nei-"ther is he fit to give the Holy Sacrament; "I will never receive the Holy Sacrament "from him." A Prohibition was granted and the Defendant could never get a Conſultation.

Hil. 1 *Annæ*, *In Scac' Richmond*'s Caſe, ſaid of a Parſon, "He is a Villain, and a "Raſcal, and a ſorry Fellow, and not fit to "preach;" held by three Barons againſt one not ſuable in the Spiritual Court.

Parker Chief Juſtice: I think it is a poor narrow Notion that has been gone upon, that where the Words import a Crime for which the

the Parſon may be puniſhed or cenſured in the Eccleſiaſtical Court, in that Caſe only the Scandal may be puniſhed there; for the taking away his Reputation amongſt his Pariſhioners, and thereby diſabling him from doing good, may be of much greater Conſequence, but that Rule may perhaps be well underſtood in Oppoſition only to what is puniſhable at Common Law; but as at Common Law an Action will lie for ſome Words that do not charge a Crime puniſhable, ſo why may not Suits lie in the Eccleſiaſtical Courts for Words that import great Scandal and Detriment to a Clergyman in his Profeſſion, though they do not charge him with a Crime cenſurable there?

Take a Prohibition to declare upon forthwith.

Eyre Juſtice: The Caſe in *Lutw.* 1053. is miſreported; I have a Note of it whereby it appears, the Conſultation was granted only as to the Words "Pimping Raſcal," becauſe *Pimping* is a Matter of Eccleſiaſtical Conuſance.

Poulſon and *Franſhaw*.

PARKER Chief Juſtice delivered the Reſolution of the Court, upon the Exception taken to the Writ of Error.

Variance between Writ of Error and Record. See Antea 80.

We are of Opinion that the Record is well removed, the Writ is directed *Thomæ D'no Trevor*, Johnſon *and* Altham.

Trevor, the *Prita* is *Cor' Thom' D'no Trevor, Baronc de Bromham*, and from hence the Objection arises; the Question is, whether it be a material Variance, and in order to prove that, it is said that Baron of *Bromham* is a Part of the Name, but it has not been made out to be a necessary Part. 4 *Inst.* 666. was cited, but what relates only to Creations by Patents in the Case of Barons by Tenure or by Writ, is otherwise; anciently the Writs of Summons to Parliament were generally by the Name of Knight; as appears by *Cotton's Abr.* 1 *R.* 2. a Writ of Summons directed to ——— *Baroni de Greystock*, but that was left off, and his Heirs are stiled Knights; this is the only Instance from *E.* 3. to *H.* 6th's Time, nor are any called Lords till 27 *H.* 6. Writs are directed *Johi Beauchamp mil' D'no de Beauchamp*, though by the express Words of the Patent he is directed to be stiled *D'nus Beauchamp Baro de Kidermin'ster*, yet was he never called to Parliament by the Name of Baron. *Selden's Tit. Honour* 616. *Ibid.* 571.

Nosme de Dignite.

Ancient Form of Writs to Parliament.

Difference between Summons to Parliament and legal Proceedings.

Mr. *Selden* says, that in Writs, Pleadings, and other legal Instruments, they are properly stiled *D'nus*, and Baron is wholly omitted, and in Parliamentary Writs *Chevalier* supplies it.

8 *H.* 6. 9 & 10. A Diversity was taken between Barons and Dukes, or Earls, for in the latter Case they need not to be called Baron; and that Book says, that it is in both Surplusage, and whether it be in the Writ or out of the Writ it matters not, the Judgment must be affirmed.

Nota;

Nota; The Chief Juſtice ſaid, that this would ſerve for an Anſwer to the Objection to the Writ of Error in * *Johnſton* and *Altham*, where the Writ was directed *Thomæ D'no Trevor de Brombam*, and the *Pl'ita cora' Tho. Trevor Mil'*, becauſe ſince Barons were called to Parliament by *Miles*, that ſhewed it to be no Inconſiſtency, but it might be the ſame Perſon, but *dubitavit* upon the Authority of Mr. *Selden*, (*Supra*) which ſhews that that Stile can be only uſed in Writs of Summons to Parliament. * Antea.

Regina v. ———

AN *Habeas Corpus* iſſued to the Provoſt Marſhal of the *Savoy*, to bring up the Body of ——— by return it appeared he was committed by ——— *Brown*, a Captain in the Royal Regiment of Horſe, and the Warrant was ſet forth, but no Cauſe of the Commitment appearing therein, the Court diſcharged him. *Ret. de Hab. Corpus.*

Regina v. *Laughton.*

SIR *P. King* moved to quaſh an Indictment on the *Stat.* 12 *Car.* 2. *c.* againſt Uſury, becauſe a particular Method of Recovery is preſcribed, *viz.* by Action of Debt, Bill, Plaint or Information, and cited the Caſe of the *Queen* and *Standiſh*, *Mich.* 4 *Annæ*, which was quaſhed upon Debate for that Cauſe; Indictment for an uſurious Contract. Poſt. 2 Seſſ. Caſ. 216. S. P.

Where the particular Remedy given for the Penalty of a Statute, excludes the Indictment and where not.

but *Parker* Chief Juſtice doubted, and took a Difference between the Statute, when the Manner of Recovery was made Part of the Deſcription of the Penalty, *ſcil.* ſhall forfeit 5*l.* to be recovered by Action, *&c.* and other Statutes where the Method of Recovery came in afterwards in a diſtinct Clauſe, as in this Caſe, he ſeemed to think that the former did wholly exclude Judgment but the latter not.

Vide Regina v. *Green, Hil.* 10 *Annæ*, quaſhed for this.

Another Exception was taken, that the Indictment was found at the Seſſions of the Peace, which has not Cognizance of Penal Statutes.

Adjournatur.

Hemſted Norris Pariſh Inhabitants and *Chevely Pariſh Inhabitants.*

Antea.

THE Order of Seſſions for quaſhing the Order of two Juſtices confirmed generally *per Curiam.*

Nutton and *Crow.*

10 Mod. 283.

MR. *Salkeld* argued for the Plaintiff in Error.

In order to clear the Way of our Objections, I muſt premiſe that the *Remittitur*, which is entered in this Cauſe upon the two firſt Counts, cannot

cannot help the Plaintiff, becauſe the Defendant has demurred to the Declaration, and thereby challenged the Defects of it; and it was not in the Plaintiff's Power to help them afterwards, it muſt be taken as it ſtood when the Defendant demurred.

Our Objections to the Declaration ſtand thus:

The firſt Promiſe was made the 22d of *January* 1708. to the Teſtator in his Life-time, the ſecond made 23d *January* 1708. to the Teſtator in his Life-time, the third is a Promiſe to the Plaintiff's Executor, upon an Account between the Plaintiff and Defendant of Money due to the Teſtator, laid 5 *May* 1709. hereupon we offered that the Actions were not joinable, the Plaintiff being intitled to the firſt and ſecond as Executor in Right of his Teſtator, and to the third in his own Right.

But in this we are anſwered, and accordingly the Court inclined, that the laſt Promiſe is laid by the Plaintiff as Executor, and that the Accounting has not altered the Nature of the Duty, but it remains upon the former Right, and therefore the Actions are very properly joined.

But upon this we ſay, that the Plaintiff becomes liable to a worſe Objection, *viz.* that he has ſhewn no Title to his Action, for the Letters Teſtamentary which he has produced bear Date 1 *Sept.* 1708. and *Benjamin Nutton* the

the Teſtator is alledged to be alive 23d *January* 1708. ſo that either theſe are not the Letters Teſtamentary of the ſame *N. B.* or elſe the Will was proved in the Teſtator's Life-time, which equally over-throws the Plaintiff's Title.

This is within the Reaſon of the Common Caſe, if in Debt upon a Bond by *B. N.* dated 20th *January*, the Defendant has craved *Oyer*, and thereupon was ſet forth a Bond of *B. N.* dated 20th *February*, and demurred, the Plaintiff could not have recovered, but the Law would underſtand, that the Plaintiff has miſtaken his Bond, and yet in that Caſe the Identity of the Bond is averred by *prædict* as much as here, for it is *profert hic in Curiâ ſcriptum præd*' & *petit auditum ſcripti præ-dicti*.

Bro. Monſtrans de faits, &c. 82. Adminiſtrator brought Debt, and counted of an Adminiſtration granted to him at *A. Oyer* was craved, and it appeared to bear Date at *B. C.* therefore was held nought.

Cro. Car. 165. *Treſp'*, A falſe Impriſonment laid 30 *October*, the Defendant juſtified 17 *Sept.* by Proceſs on a *Supplicavit*, the Plaintiff replied *quod poſtea, viz.* 1ſt *Oct.* he impriſoned him *de ſon tort*; & *per totam Cur'* it was held a Departure.

The Queſtion therefore will be reduced to this, whether Producing Letters teſtamentary be neceſſary to ſupport the laſt Promiſe, and it

it certainly is ſo, if that be an Action in Right of the Teſtator; and herein it is to be conſidered,

Firſt, That this is an Account on one Side only; Secondly, that the Defendant comes to an Account voluntarily and without the ſpecial Requeſt of the Executor, the Conſequence of which is, that here is no new Duty created, but only the Sum due aſcertained, and in point of Duty it remains the ſame as before. So *per Hale*, in *Vent.* 268. that if there be no ſpecial Requeſt proved, the Debt remains as before.

Whereas an Executor brings an Action *Jure ſucceſſionis* on a Cauſe of Action veſted in the Teſtator, he muſt make out his Title from him, and produce his Letters teſtamentary.

But where he ſues *ex novo contractu*, or from a wrong done to the Poſſeſſion of his Teſtator's goods, ſo that the Cauſe of Action never was in the Teſtator, but ſprung up ſince, there the Letters teſtamentary need not be ſhewn.

Hob. 38. *Cope* and *Low*, in Action *per admor'* for *Aſſ.* to the inteſtate, held that the adminiſtration is the Title and Subſtance of this Action, and it ought to be ſhewn that it may appear to the Court to be as he has pleaded it.

But

But in *Style* 264. *King* and *Weeden*, the Plaintiff declared that the Defendant being indebted to his Inteſtate, in Conſideration that the Plaintiff would forbear to ſue him till, *&c.* promiſed to pay, and ſhewed no Letters of Adminiſtration, which was moved in Arreſt of Judgment; *Et per Rolle:* It can not be neceſſary in this Caſe, for here is a new Conſideration.

The ſame Law is if an Executor bring Treſpaſs for Goods taken out of his Poſſeſſion. *Plowd.* 46. So wherever the Wrong is done to the Executor.

In *Barrett*'s Caſe, cited in *Hob.* 38. in Caſe againſt the Sheriff for ſuffering the Defendant to eſcape, being in Cuſtody on a *Capias utlegatum*, in an Action by the Plaintiff as Executor, and held not neceſſary to produce Letters teſtamentary.

Admitting for Argument's Sake, that it is not neceſſary in this Caſe, that if the Plaintiff will unneceſſarily ſhew that which will abate his Action, the Court muſt take Notice of it.

Hob. 164. *Treſp.* v. *A.* and declares *quod S. ſimul cum B.* did you Treſpaſs, the Writ ſhall abate, otherwiſe if a Jury had found it, 2 *H.* 7. 16. ſo that the Difference is upon its being the Plaintiff's own ſhewing, which is the Caſe at Bar.

Roll.

Roll. 176. *A.* brought a Writ of Covenant as Error, and by his Count ſhewed that the Teſtator made him and *B.* Executors, and that *B.* renounced, but *B.* was not named in the Writ, nor was he alledged to be dead; upon *Non eſt factum* pleaded, and Verdict for the Plaintiff, this was moved in Arreſt of Judgment, and it was anſwered that the Defendant having pleaded in Bar had waved the Advantage of all Matters in Abatement. But the Court held that, by pleading to the Action, the Defendant might loſe the Advantage of all extrinſick Matters of Abatement, but that nothing would admit ſuch Matter as appeared upon the Face of the Record, for the Court *ex officio* might abate.

Paſch. 3 *Annæ*, *Adam* v. *Tertenants* of *Savage*, a *Sci' fac'* upon a Judgment in *B. R.* at *Weſtminſter*, ſues as Adminiſtrator upon Adminiſtration committed by Archdeacon of *Dorcheſter*; the Defendant pleaded that he was not Tertenant, but the Writ was abated, for though no Title was neceſſary, yet the Plaintiff having ſhewn a Title which is really no Title, the Court muſt take it to be as he has ſhewn it, and cannot give him Judgment.

Mr. *Lutwyche contra*: I admit the laſt Promiſe is only in Relation to a Debt due and unpaid to the Teſtator, and not altered ſo as to require a new Sort of Action, but it is certainly an Account, which I have heard it inſiſted on at *Niſi prius* cannot be unleſs there be Items on both Sides.

This

This is a ſufficient Probate to make the third Count a good Declaration, for it is upon a Promiſe 5 *May* 1709. and the Probate is dated in *September* before, and the two firſt Counts are put out of the Caſe by the *Remittitur*.

It is objected, that we have laid the former Promiſes to the Teſtator *in vita ſua*, at a Time ſubſequent to the Date of the Probate.

Repugnancy. If this be ſo, then it is a Repugnancy, and either of theſe Counts or the Probate muſt be rejected, and in Affirmance of a Judgment, the Court will reject that which will not be wanted rather than the other. *Cro. Jac.* 557. Where the Declaration is for Damages, and Part is good and Part is ill, and there is a Demurrer to the whole, the Court will reject that which is ill.

2 *Saund.* 379. there are many Caſes where a *Remittitur* will put Part of the Declaration out of the Caſe.

If there had been no Profit, the Declaration would not have been good, unleſs ſpecially ſhewn for Cauſe of Demurrer, by the Act for Amendment of the Law, 5 *Ann. c.* 16. If theſe are the Letters teſtamentary of another Perſon, then it will be the ſame as none at all, and come under the ſame Rule. (2 *Saund.* 402.)

Per Mr. *Branthwaite*, Authorities to prove the Executor; cannot ſue before Probate, though

though he may be ſued. 9 *Co.* 38, 39. *Co. Lit.* 292. *Plowd.* 280. *b.* *Hutt.* 31. 5 *Co.* 28.

But if he ſhews it duly proved at any Time before he declares, it is ſufficient. *Roll. Rep.* 917. But if it appears otherwiſe, though not pleaded in Abatement, the Court will abate the Writ *ex officio*; 2 *Lev.* 197. there it was pleaded in Abatement upon *Oyer* after Imparlance, and the Court held that tho' there be no Plea in Abatement, yet they ought *ex officio* to abate the Writ, becauſe it was a Matter that appeared on Record before them. 9 *Co.* 53. *Hickmoot's* Caſe.

Curia adviſare vult.

Regina v. *Cobbold.*

Certiorari before Juſtices of Peace on the Game Act quaſhed, becauſe the ſame Perſon both the Informer and Witneſs. See 10 Mod. 193.

ON a *Certiorari* was returned, a Conviction upon the *Stat.* 5 *An. c.* 14. for Preſervation of the Game. Mr. *Salkeld* took an Exception to it, that the ſame Perſon was both the Informer and Witneſs.

The Act runs, that if any Perſon not qualified be convicted before a Juſtice of Peace, on the Oath of one or more credible Witneſſes, he ſhall forfeit 5 *l.* one Moiety to be paid to the Informer, the other to the poor of the Pariſh where the Offence was committed.

He

He inſiſted that the Informer could not be a Witneſs, becauſe he has an Intereſt in the Forfeiture, which after Information cannot be pardoned. 3 *Inſt.* 194.

Evidence at Common Law.

That at Common Law the Evidence of a Party intereſted ſhould never be admitted; as on an Information for Uſury, the Party ſhall never be a Witneſs, becauſe it is to avoid his own Contract; ſo in Forgery, *Regina* v. *Whiting*, *Mich.* 10 *W.* 3. *apud Guildhall*; the Caſe was, the Mother gave her Son a Note for 5*l.* and he ſlid in a Cypher, and made it 50*l.* and it was held the Mother could not be a Witneſs, becauſe it was to defeat her own Note.

Trials in a ſummary Way, Derogation of Common Law.

That this is a ſtrong Caſe, the Trial here is in a ſummary Way, not by Jury, but only *per teſtes* to a Judge, who is ſuppoſed wholly ignorant of the Cauſe; *Ergo* the Witneſſes ſhould be leſs liable to Exception, it is a Trial in the Forms of the Civil Law, where regularly two Witneſſes are required, *Teſtimonium unius ſemiplenæ facit probationem*, and the Father is not allowed to be Witneſs for his Son, and *vice verſa*.

If this prevail, leſs Credit will ſuffice for a Witneſs in ſuch Trial, than in a Trial by the Common Law.

Exceptions to Witneſſes.

That the Statute not only requires a Witneſs but a Credible one, *i. e. Exceptione major*, there are two Exceptions to Witneſſes, ſuch as entirely deſtroy his Teſtimony and prevent

prevent his being a Witneſs; Secondly, ſuch as only diminiſh the Credit of his Teſtimony.

The Exceptions in this Caſe would deſtroy his Teſtimony, and prevent his being a Witneſs; *a fortiori* he cannot be a credible Witneſs.

There are ſome Caſes where the Informer ſhall be allowed a Witneſs from the Neceſſity of the Thing, as in Robbery or Rape, and *Neceſſitas derimit onus probandi*; but here it is not neceſſary, for he may ſet up any Body to be an Informer. Where a Party intereſted may be a Witneſs.

Firſt Objection, That this would diſcourage Proſecutions, for a Man will not be at the Trouble to cauſe an Information to be made, unleſs he may have Part of the Penalty.

Anſwer, Men are preſumed to love the Laws of their Country, and the Execution of them, it is *pro bono publico*, in which they are included.

Second Objection, The Reſolution of all the Judges (except *Saunders* and *Raymond*) in *Serjeants-Inn Hall*, upon 22 *Car.* 2. *c.* 1. againſt Conventicles, that the Informer is a lawful Witneſs, notwithſtanding Part of the Penalty to be given him by the Act. 2 *Jones* 233. 3 Mod. 114.

To that he oppoſed the Opinion of this Court, in the *Queen* v. *Shipley*, *Mich.* 4 *Annæ*, *n.* 84. which was an Information for keeping

a Still and diſtilling Low Wines, and it was quaſhed becauſe the ſame Perſon appeared to be both the Informer and Witneſs; to that he alſo oppoſed the Common Law of *England*, the Laws of all Nations, and the univerſal Rule of Juſtice which agree in this, that a Man cannot be his own Witneſs any more than his own Judge.

Upon this ſingle Exception the Conviction was quaſhed.

Of the Term of Saint *Hilary* in the twelfth Year of Queen Anne.

Harriſon v. *Thornborough.*

Action for Words. 10 Mod. 196. See Skin. 364. Yelv. 21.

IN an Action for Words the Plaintiff declared, that whereas he was a Dyer, and there was a Suit depending between him and *B.* and a Trial was had, at which one *Bell* was a Witneſs, and the Defendant *tiel jour & ann' quoddam Colloquium habens cum quodam Hugone Raw*, of the Trial and *Bell*'s Evidence, and of the Plaintiff, ſaid theſe Words, *viz.* "*Harriſon* got a poor Fellow "*Bell* to forſwear himſelf, (*Innuendo* at the "Trial,

" Trial, *et tunc alloquendo præfat' Hug' Raw*,) " you or he *Innuendo quer'* hired him, (*Innu-* " *endo Bell*) to forſwear himſelf, *et quoddam* " *al' Colloq'm habens*, *&c.* he ſaid two Dyers, " *Innuendo quod duæ perſonæ artem ſive Myſter'* " *Tinctor' exercen' decoctor deven'*; and that " for any Thing that I know *Harriſon* will go " off before this Time twelve Months." Verdict for the Plaintiff and entire Damages.

Mr. *Solicitor* and Mr. *Lutwyche* moved in Arreſt of Judgment.

That the Action did not lye, that the firſt Words, " *Harriſon* got a poor Fellow to for- " ſwear himſelf," does not import a Charge of Subornation, for though it was alledged that they were ſpoke with Relation to the Evidence he gave at the Trial, yet it was not ſhewn that that Evidence was material, and if he did forſwear himſelf in an immaterial Matter that would not be Perjury in him, Rol. Abr. 70. and conſequently not Subornation in the Plain- pl. 43. tiff; but they inſiſt that if theſe Words taken by themſelves would be actionable, yet the ſubſequent Words (which appear to be ſpoken at the ſame Time) had rendered them wholly uncertain. " You or he hired him," this explains the firſt Words and reduces them to this, " You or *Harriſon* got a poor Fellow to " forſwear himſelf," which is ſo uncertain, that it cannot be a Scandal upon either. *Roll. Lib.* 81. 3 *Cro.* 497. *Carter* 55. It was objected to the ſecond Count, that the Words " Gone off," were uncertain and did not im-

port Bankruptcy, for a Man might be ſaid to go off upon divers Accounts; but if they ſhould be ſo taken, yet the latter Words did not charge the Plaintiff, but at moſt did only expreſs Suſpicion of him, that to tie up the Meaning of the firſt Words to Bankruptcy, the Plaintiff had laid an *Innuendo*, but that could not carry the Words beyond their ſtrict Meaning for Want of an Averment, to which that *Innuendo* might refer. 4 *Co.* 20.

But the Court held that the firſt Exception to the firſt Count, was only an Exception to the Form of laying the Slander, that the Speaker had not only alledged the Charge with ſuch preciſe Certainty, as it ought to have been in an Indictment, which was a Rule they would never admit; that as to the Words *you* or *he* hired him, they were a diſtinct Slander, and only related to the Payment of Money, which was not material and could not render the firſt Words uncertain.

3 Cro. 308, 93.

But *Parker* Chief Juſtice thought, that if the Words had been in the Disjunctive only, "You or *Harriſon* got, *&c.*" they would be actionable for either of them, with an Averment that neither did.

Rule of Underſtanding ſcandalous Words.

As to the ſecond Count, they held that "Gone off," as underſtood in Common Parlance, applied to the Plaintiff here as a Tradeſman, mean Bankruptcy, and that the Rule now was, that Words ſhall be taken in the Senſe that the Hearers underſtood them, and

and not *in mitiori ſenſu*, as formerly, therefore no *Innuendo* was neceſſary, but if it were, it was well laid in this Place, and that an Averment is only neceſſary where the *Innuendo* concerns ſome new Fact, and not where it is brought in to explain for the Senſe of the Words.

Where Averment neceſſary to ſupport an *Innuendo*.

Per Cur', Judgment for the Plaintiff.

Some Things were ſaid in general at the Bench of theſe Actions for Words, and all Judges agreed that they ought not to be diſcouraged.

Actions for Words not to be diſcountenanced.

Parker Chief Juſtice remembered a Saying of *Treby* Chief Juſtice, that People ſhould not be diſcouraged that put their Truſt in the Law, for if Men could not have a Remedy at Law for ſuch Slanders, they would be apt to carve it for themſelves, which would let in all the ill Conſequences of private Revenge; and *Powys* Juſtice ſaid, that the latter Judgments had been right in denying the Rule of taking Words *in mitiori ſenſu*, becauſe it left a Liberty for Men to defame others, provided they did it with a little Caution, and it had been known that People had taken Advice of Counſel upon a Sheet of Paper full of ſcandalous Words, in order to know which they might out with ſafety.

Serjeant *Cheſhire*, for the Plaintiff, cited theſe Authorities of uncertain Slanders held actionable, *Sid.* 220. "I dreamt you ſtole "a Horſe."

Lev. 277. "I heard a Bird ſing you committed Felony."

Style 130, 141. "He is a Bankrupt for ought I know."

2 *Cro.* 407. "I think in my Conſcience, if he might have his Will, he would kill the King."

2 *Keble* 718. *Raym.* 207. "I believe all is not well with the Plaintiff, many Merchants have failed of late, I expect no better of him."

Dyer 72. "He will be a Bankrupt within three Weeks."

Abrathut v. *Brandon.*

Award. 10 Mod. 200.

DEBT upon a Bond conditioned to perform an Award; Plea *Nul agard*, Plaintiff replies the Award which was, that the Defendant ſhould pay the Plaintiff on the Firſt of *April* —— and 25*s.* a-piece to the Arbitrators on the Firſt of *May*, and that upon Payment of the ſaid Monies, mutual general Releaſes ſhould be given to the Time of the Award; that the Arbitrators could not award Money to be paid to themſelves, and it was only upon Condition, that the Releaſes were to be given, which is the only Thing awarded to the Plaintiff; that the Releaſes are to be of Matters to the Time of the Award, which exceeds their Authority, that being only

only to determine Matters to the Time of the Submiſſion; and for theſe Reaſons the Award was inſiſted to be void, but it was anſwered by *Parker* Chief Juſtice, That the Award was good for Part, and void as to the other Part, that as to the Payment of the Money on the Firſt of *April* it was good, and the Plaintiff's Breach well aſſigned for that, but as to the Payment of the 25*s.* to the Arbitrators, it is void, and therefore that was no Part of the Condition upon which the Releaſes were to be given, and then as to the Releaſes, the Award of them was void, ſo far as it exceeded the Submiſſion, and a Releaſe of all Matters to the Time of the Submiſſion would be a good Performance of it. *Mich.* 6 *W.* 3. *Freeman* v. *Barnard.*

Arbitrators award Monies to themſelves void.

Releaſe to the Time of Award void, *quoad* all Things after Submiſſion.

Held *per Holt* Chief Juſtice, That a Releaſe of all Actions to the Time of the Submiſſion would be a good Performance of an Award, to releaſe all Actions to the Time of the Award, and that two Anſwers had been given to that Objection; the old one was (when they held an Award to be entire) that nothing ſhould be taken to have ariſen ſince the Submiſſion, unleſs ſpecially ſhewn, and ſince the Law has been held, that an Award may be good for Part and void for Part, the other Anſwer has been as above.

Hob. 190. Latw. 524, 549.

But *Parker* Chief Juſtice obſerved that this Difference muſt be always taken, that where the Juſtice of Award will not be affected by it, the void Part ſhall be rejected, but where the whole will be made unjuſt by rejecting the void Part, the whole muſt be avoided by it.

Lev. 344. Diverſity upon that.

Eyre and *L. Powys* Juſtices *accord*, and *Judicium fuit pro quer' niſi.*

Regina v. *Allenby et al'.*

Conviction for Deer-ſtealing quaſhed.

EXCEPTION was taken to a Conviction for Deer-ſtealing, that it was only alledged, that the Defendant killed it in a Park, without adding where Deers uſed to be kept.

Quaſhed *per Cur'* for that Reaſon.

Another quaſhed becauſe the Verbs in the Pretertenſe *Informavit*, &c.

Pockinghall v. *Hawkins*.

Motion for a new Trial upon a Point of Law not inſiſted on at the former Trial. 10 Mod. 202. S. P.

MANDAMUS to ſwear the Plaintiff into the Office of Alderman of *Helſton*; Defendant returned *Non fuit electus*, and thereupon a Verdict was given for the Plaintiff at *Cornwall* Aſſizes, before Mr. Baron *Banaſtre*; the Defendant moved for a new Trial for that the Judge directed contrary to Law.

The Caſe was, that by the Charter there are a Mayor and four Aldermen who are to continue for a Year, *vel aliter ſicut*, &c. that upon the Vacancy of an Alderman, *Liceat Majori & reſiduo Alderm' vel majori parti eorundem*, to chooſe another in his Room; the Plaintiff was an Alderman, and the Day before his Year expired was re-elected by a Majority

Majority of three againſt two, ſo that he voted for himſelf. The Points were, firſt that regularly a Man cannot be elected into an Office before a Vacancy; ſecondly, that upon the Words of this Charter, the Plaintiff could not vote in this Election, being not one of the *Reſid' Alderman'*; the Court inclined to think that the Law was againſt the Plaintiff, and that this could not be an Election, but Baron *Banaſtre* certified that he himſelf mentioned thoſe Points at the Trial, but the Defendant's Counſel did not inſiſt upon them, but went over to other Matters, *viz.* the not taking the Oaths, ſo that he took it, they entirely waived the former, and relied ſolely upon the latter, and therefore left it to the Jury upon that only, ſo that the Queſtion came to be this;

Whether (if a Point of Law be ſtarted at a Trial, and the Counſel of the Party whoſe Intereſt it is to take Advantage of it, wave the Conſideration of it, and go over to Matters of Fact, upon which it is left to the Jury, who find contrary to the Law in that Point) this ſhall be a ſufficient Ground for a new Trial.

Parker Chief Juſtice mentioned a Caſe of my Lord *Peterborough* in *C. B.* where a Point of Law which aroſe upon the Evidence was omitted to be mentioned, which occaſioned the Verdict to go wrong, and upon that a new Trial was prayed, and denied, becauſe perhaps an Anſwer might then have been given to it by varying the Fact with new Evidence,

Diverſity where the other Side might have varied the Fact by Evidence, and where not. Diverſity between a Waiver expreſs and implied, and where the Right would be concluded and where not.

dence, and becauſe it was an Ejectment which would not conclude the Right, but might be brought over again; he obſerved the firſt of thoſe Reaſons could not take Place here, the Fact being undeniably certain from the Number of the Votes and Words of the Charter, which would not be altered; and as to the ſecond, he ſeemed to think that when a Point of Law was ſtarted and appeared to the Judge, it would be very hard to ſay, that the Counſel's not inſiſting on it, which is an implied conſtructive Waver, ſhould prevent a new Trial if the Judgment upon it would abſolutely conclude the party's Right; but he admitted, that where the Waiver was voluntary and expreſs, no new Trial ſhould be granted for it, though the Right would be concluded; that this was only an implied Waiver was agreed, and whether the Right would be concluded by it, he ſaid depended upon this Conſideration, whether the Court would grant an Information in the Nature of a *Quo warranto*, againſt an Officer who had been ſworn by a peremptory *Mandamus*, upon a Judgment of that Court; he agreed that the Court would never do it, where it appeared that the Merits had been fully tried on the *Mandamus*; but that if the true Merits had not come rightly in Queſtion, ſuch a Judgment ought not to fix an illegal Officer upon the Corporation, for that is a Matter of a publick Nature and concerns the Government, he concludes, that the Defendant ought to be at Liberty either to have a new Trial or an Information in this Caſe.

Where an Information *Quo warranto* may be againſt an Officer ſworn in by peremptory *Mandamus*.

L.

L. Powys, Eyre, and *J. Powys.* It is thought it would be of very ill Conſequence to grant new Trials, for Omiſſions or Neglects of the Counſel, and that Want of Preparation would be as good a Ground, that they had been hitherto only granted for the Miſtake of the Judge or Jury; but here the Defendant reſted his Cauſe only upon a ſingle Point in which Juſtice was done; better that there ſhould be a Miſchief than an Inconvenience; but they agreed it might be proper to have the Right tried on an Information.

Reaſon of new Trials.

Fiſh v. *Miller.*

IN Treſpaſs the Defendant moved to plead double, Not guilty and Juſtification for a Way.

Double Pleadings *ſur* 4 & 5 *Ann. c.* 16.

Mr. *Gilbert* ſhewed Cauſe againſt it, that they are inconſiſtent, and though the Statute excuſes the Duplicity of the Matters, yet it did not intend to allow of Repugnances, and cited a Caſe of *Parker* and *Cooke* of this Term, in this Court in Covenant, where it was denied to plead *Non eſt factum* and a Condition precedent.

Mr. *Whitaker* for Defendant cited the Caſe of Serjeant *Selby* in *C. B.* where the Court allowed in Replevin to plead *Non cepit*, and avow for Rent.

Parker Chief Juſtice would have it eſtabliſhed for a Rule, never to allow a Defendant to

Were allowed to plead repugnant Matters.

to plead inconſiſtent Matters, but he would not do it without ſpecial Cauſe, as upon a very old Bond to plead *Non eſt factum* and *Solvit ad diem*. So Time was given to the Defendant to procure an Affidavit of ſpecial Cauſe.

Ainge v. *Morgan*.

Prohibition to a Suit for Faculty of a Pew in Church.

MR. *Lechmere* prayed a Prohibition to the Spiritual Court, in a Suit there for a Faculty of five ſitting Places in a Pew, over and above three ſitting Places, which were formerly an entire Seat or Pew belonging to the Plaintiff's ancient Meſſuage, which was now pulled down, and the Ground laid together with the Defendant's Pew, without Prejudice to the Plaintiff's Right; the Suggeſtion preſcribed for the old Pew as appurtenant to the ancient Meſſuage, *quodque ipſe et omnes il' quorum ſtatum, &c. a tempore, &c.* having uſed to repair it, and that the proceeding below is to deprive him of his Freehold, and that he could not be able to preſcribe for the Seats in the new Pew.

Of Faculty *quid.* 12 Co.

Parker Chief Juſtice ſaid, that if a Faculty is only granted for the Sake of Quiet and Order in the Church, that is an Aſſignment of a Seat for the Perſon to ſit in where the Ordinary has the Right; but where any particular Perſon has a Right, the Ordinary cannot aſſign, that therefore the Plaintiff's Right would not be affected by the Faculty, but he would be intitled to the ſame Ground as before,

fore, though put in another Form, the Ordinary only appoints other Perſons to ſit by him in the vacant Room, but he muſt have his three ſitting Places in the very ſame Spot where his old Seat ſtood, and if he were diſturbed, might have an Action on his ancient Right.

L. Powys, *Eyre* and *J. Powys accord:* Prohibition was denied.

Nota; It was ſaid by *Cheſhire* Serjeant *le Roigne pro Def.* that a Faculty for a Seat in a Church is only *pro hic et nunc*, and the Ordinary cannot grant one to a Man and his Heirs, that he may repeal it; as in Caſe of a Seat granted to a Perſon of great Condition, by Reaſon of an Eſtate then in him, which afterwards comes to a mean Man, it may be repealed, *mes quære.*

Barnardiſton v. *Fouliger.*

Award. 1 10 Mod. 204.

PARKER Chief Juſtice delivered the Reſolution of the Court.

Debt upon a Bond with Condition to perform the Award of Sir *Robert Davers*, whereby the Submiſſion appears to be of all Actions, Suits, Damages and Demands, between the Plaintiff and one *Henry Love*, the Award is ſet forth in the Replication, dated 23 *Junii*, and orders that all Suits between the ſaid *J. B.* and *H. L.* ſhould ceaſe, and whereas a Year's Rent would be due and payable to the ſaid

ſaid *J. B.* from the ſaid *H. L.* on the 25th of *June*, and the ſaid *J. B.* owed the ſaid *H. L.* 6*l.* it is awarded that *Love* ſhould pay the Plaintiff the ſaid Rent on or before the ſaid 24th Day of *June*, and the Plaintiff ſhould allow *Love* the ſaid 6*l.* out of it, and that upon the Payments aforeſaid general Releaſes ſhould be given; the Breach aſſigned is, that *Love* proceeded in a Suit wherein he was Plaintiff againſt the ſaid *J. B.* and *C.* and *D.* Defendants.

We are all of Opinion,

Firſt, That the Award is void.

Secondly, In Caſe it were good, yet the Plaintiff has not aſſigned a Breach.

Award of a Sum of Money before it becomes due, void,

Firſt, As to the firſt Point; one Article of it is plainly void, *viz.* that the Rent which is ſhewn not to become due till the 24th *June*, and yet on the 23d it was awarded to be paid to *J. B.*

This was not within any of the Terms of the Submiſſion, it was not in Action nor Demand at that Time, and poſſibly might never become due to the Plaintiff, for the Rents might be extinguiſhed.

The Term ſurrendered, the Leſſee evicted, or the Leſſor die, whereby the Rent would become due to the Reverſioner. *Roll. Abr.* 245. *pl.* 8.

But

But this Article being void will make the whole void upon two Accounts.

First, Upon the Juſtice of the Thing, for 6*l.* is awarded to *H. L.* which is to be paid him only by Defalcation out of the Rent when paid to *J. B.* which if it ſhould never happen upon any of the Contingencies before mentioned, then *H. L.* can never have his Money; the Rule is, that if one Article of an Award is void, and the reſt cannot juſtly be performed without it, the whole muſt be void. *Saund.* 292. *Pope* and *Brett*, 2 *Cro.* 584. This avoids the whole Award becauſe it makes it unjuſt to be performed without it.

Secondly, The whole muſt be void in this Caſe by Reaſon of the particular avoiding of the Award upon the Payments aforeſaid, mutual Releaſes are to be given; ſince the Payments cannot be made, no Releaſes are to be given, and conſequently here is no End. Be conditional.

We think the Breach not well aſſigned, for the Submiſſion and award only mentions Articles between *J. B.* and *H. L.* but the Proceeding here laid as a Breach in an Action by *H. L.* againſt *T. B.* and which is not within the former Deſcription; *Roll. Abr.* 246. *pl.* 4. is a ſtronger Caſe than this, for it was held that an Action by *A.* and his Wife againſt *B.* was not within the Deſcription of an Action between *A.* and *B.* Rol. Abr. 753. pl. 3.

This is agreeable to the Rule of Deſcriptions of Actions in all other Caſes, as upon Removals of Records by Writs of *Certiorari*.

Mich.

Mich. 12 *W.* 3. *Rex* v. *Brown.*

Mich. 1 *Annæ, Regina* v. *Alkinſon.*

It was held that a *Certiorari* to remove Indictments againſt *A.* would remove an Indictment againſt *A.* and *B.* and *ſic vice verſa.*

No Inconvenience.

And no Inconvenience can happen from this, for it is very eaſy for the Parties to mention thoſe Actions if they intend they ſhall be included; but on the contrary it would be a very great Inconvenience, if they ſhould be taken to be included by Conſtruction againſt the Intention of the Parties.

The Plaintiff *nil capiat per Billam.*

Rex v. *Brown, Mich.* 12 *W.* 3. *Holt* Chief Juſtice ſaid, that a *Certiorari* to remove *omnia & ſingula Indictamenta* in which *A. B.* and *C. indictati ſunt*, extends only to joint Indictments againſt them all, but if it be *omnia, &c.* in which *A.* is indicted, that will remove all Indictments as well where he is jointly as where he is ſingly indicted.

Backhouſe

Backhouſe and *Wells*.

PARKER Chief Juſtice delivered the Opinion of the Court.

The Queſtion is, whether *John Barker* took an Eſtate for Life or in Tail, by the Deviſe of Lands to him for Life only, without Impeachment of Waſte, and after his Deceaſe to the Iſſue Male of his Body, (if God ſhall bleſs him with Iſſue) and Heirs Male of ſuch Iſſue Male, which depends upon this, whether the Words Iſſue Male of his Body, *&c.* are Words of Limitation of Eſtate to him, or of Purchaſe to carry a Remainder to the Iſſue; we all hold that *John Barker* had only an Eſtate for Life, and I think it impoſſible to find more plain and proper Words to expreſs ſuch an Eſtate, and therefore is no need of Arguments to enforce them, they are Words which a Lawyer would have uſed in ſuch a Caſe, and the Common Senſe of them does not differ from the legal one. This Matter has been argued with as much Skill and Dexterity as poſſible, but ſurely it will not follow, that becauſe the Word Iſſue is ſometimes made to have the Senſe of the Words Heirs to anſwer the Intention, therefore we ſhould give it that Senſe, in order to reject other plain Words that expreſs the Intention to the contrary.

Deviſe to Heirs for Life only, without Impeachment of Waſte, and after his Deceaſe to the Iſſue Male of his Body, carries but an Eſtate for Life to *H.* Antea 20.

The Word *only* has never been rejected, but when it was followed by the Words Heirs, with which it is inconſiſtent.

The Plaintiff muſt have Judgment.

Regina v. *Dunn.*

Order of Seſſions to oblige the Father to keep Son's Widow, quaſhed. 10 Mod. 221.

AN Order of Seſſions to oblige the Father to maintain the Son's Widow was quaſhed, becauſe not alledged that the Father was of ſufficient Ability, as required by the Statute.

Fol. 701. 3tr. 190. 2 Stra. 955. Forteſc. 303. Barn. K. B. 329. 364. Seſſ. Caſ. 54.

Nota; Mr. *Capple* ſaid, that the Order was void in Subſtance, for that the Relation ceaſed by the Death of the Son, as in the Caſe of Challenge for Favour, *quod quære.*

Dux Leeds v. *Hill Morton.*

Rule for a good Jury in *Middleſex*, granted.

THE Court granted a Rule for a good Jury in *Middleſex*, becauſe there was a Complaint made againſt the Common Panel of this Term not yet determined.

——— v. *Day.*

Special *Aſſumpſit*. Rule to bring Money into Court denied.

IN a ſpecial *Aſſumpſit* to deliver ten Load of Flour on the 19th of *October*, at the current Price, Breach aſſigned was the not delivering at the Day, and the Court *in abſentia* Chief Juſtice denied a Rule to bring the Mo-

ney into Court, becauſe it is merely uncertain, and the Queſtion muſt be about the Difference of Prices, and this would put a great Difficulty on the Plaintiff, like the Caſe of a grant——

Turner v. *Gethin.*

A Prohibition was prayed to the Spiritual Court, in a Suit there againſt the Churchwardens of St. *Margaret's Weſtminſter*, to admit the Defendant to the Office of Pariſh-Clerk, wherein he libelled, that he was duly appointed, and obtained a Faculty of the Court, but the Churchwardens refuſed to permit him to execute it; to this the Churchwardens put in an Allegation below, that by Cuſtom the Right of Nomination was in the Inhabitants aſſembled in the Veſtry. That *Henry Turner* was choſen purſuant thereunto, and was in actual and corporal Poſſeſſion of the Office, the Suggeſtion was only, that within St. *Margaret's Weſtminſter* there was an ancient temporal Office of Pariſh Clerk, that *H. J.* was in the actual and corporal Poſſeſſion of that Office, and that the Defendant ſued to the Spiritual Court to be admitted thereto, not being duly elected.

Prohibition. Antea 91.

The Court ſaid that the Suggeſtion ought to have purſued the Allegation below, and they would never grant a Prohibition upon Part of the Caſe, when it appeared to them on Part of the Caſe. 2 Roll. Abr. 242. Cro. Car. 549, 282. 13 Co. 70.

Suggeſtion ought to purſue the Allegation below.

Prohibition never granted

that if this ſhould be determined againſt the Plaintiff, there muſt go another Prohibition to try the other Matter, as it muſt be in this Caſe, upon the Cuſtom, which is the principal Point.

2 Brownl. 38. In Prohibition, Conſultation cannot be unleſs the Defendant ſhew a Right in himſelf.

Parker Chief Juſtice ſaid, if there were ſo many Bars, you may ſuggeſt them all, and that the Plaintiff has a Right, and then the Defendant has no Right, and that in order to a Conſultation they muſt ſhew a Right in themſelves, to intitle them to proceed.

By Conſent the Plaintiff mended his Suggeſtion by putting in the Cuſtom, ſo that both the Rights of the Plaintiff and Defendant might be tried; the Caſe was that the Defendant was appointed by the Dean and Chapter of *Weſtminſter*, Impropriator, and the Queſtion was, whether an Impropriator be within the Canon, which ordains that the Parſon, Vicar, or Miniſter, ſhall appoint the Pariſh Clerk.

Regina v. *Green*.

Conviction of a Baker upon the Aſſize of Bread, quaſhed. 10 Mod. 212.

A Conviction againſt a Baker for ſelling Bread wanting Weight of the Aſſize, was returned on a *Certiorari*, and Exception was taken to it by Mr. *Darnel*.

First, That the Proſecution was not within three Days according to the Statute*, the Buying being laid on the 5th and the Conviction on the 8th.

* Of 8 An. c. . which is repealed by 31 Geo. 2. c. 29.

Secondly,

Secondly, Only ſaid that the Defendant *Summonit' eſt*, and in Default of Appearance the Juſtice proceeded to convict him immediately.

Thirdly, *Quod Maria James præſtat ſacr'um ſuum corporale de veritate mater' in Informat' præd' content' & per me examinat' eſt*, whithout ſetting forth the Evidence.

Upon the firſt Exception the Court gave no Opinion, but inclined to think that the three Days muſt be taken excluſive, and it was ſufficient to come at any Time on the third Day.

As to the ſecond, *Eyre* Juſtice doubted much, whether the Juſtice had Power to proceed to convict for Non-appearance on Summons.

But it ſeems that there ſhould be a *Capias* or ſome Proceſs to bring in the Party, and remembered ſome Statutes of Revenue that give expreſs Leave to proceed for a Default, but the whole Court agreed that a reaſonable Notice ſhould have been ſhewn, for without that it could not be a Contempt; as to the third they held that the Witneſs ſhould have been ſworn *ad verit' dicend'*, and then the Evidence ſet forth *Jurat & deponit quod, &c.* but as it ſtands now the Information does not appear to be proved, for the Witneſs might ſwear it was not true; for theſe two Cauſes the Conviction was quaſhed.

1. For Want of Notice to the Defendant.

2. For Want of due ſetting forth the Evidence.

Mr. *Forteſcue pro Regina* cited a Caſe, *Regina* v. *King et al*ª, *Mich.* 10 *Annæ*, where there appeared to have been no Summons, but the Party being there accidentally upon another Occaſion, the Juſtice convicted him, and held good.

Collegium Medicorum London v. *Dr. Weſt.*

THE College of Phyſicians brought Debt againſt the Defendant upon the Statute, which confirms their Charter; for practiſing in *London*, not being licenſed.

Rule to inſpect the Books of the College of Phyſicians denied. 10 Mod. 84. Ld. Raym. 472.

A Motion was made for a Rule to inſpect the Books and By-Laws of the College, for that the Defendant being a Graduate of *Oxford*, reſiding in *London*, was *ipſo facto* by his Reſidence become a Member by Force of the Words in *H.* 8. which incorporates not only particular Perſons, but *omnes homines de facultat' præd' reſiden' in London*, and conſequently was intitled upon the Common Rule, as Member of the Body, to have a Sight of their Books; but the Court denied the Motion, becauſe that would be a hard Conſtruction of theſe Words, and that no Right of Office was concerned.

Foreman

Foreman and *Doleman.*

IN Treſpaſs for taking and impounding an Heifer *apud Coline in Com' Wilts*, the Defendant pleaded that the Place *in quo ſuppo-nitur tranſgr' præd' fieri* is called *Blackacre*, and is *ſolum & lib'um ten'tum* of the Defendant, and that he took it there Damage feaſant; the Plaintiff replied *de injuria ſuâ propriâ, abſque hoc*, that the Thing was in *Blackacre*, and the Defendant demurred.

Treſpaſs for taking Cattle; Juſtification by *Dam'* ſuffered in his Freehold, Replication *de ſon tort* and traverſe the Law.

Mr. *Reeves* for the Defendant, that the Replevin was ill, and that the Plaintiff would not take Iſſue on the Defendant's Plea, but muſt go on to *Novel* Aſſignment as in *Clauſum fregit*, which does not differ from the Caſe; beſides that the impounding made it a local Treſpaſs; he cited *Fitz. Bar. pl.* 20. that in *Tranſgr'* for taking Goods *Solum & liberum tent.* is a good Plea between the Parties.

Objection, that there ſhould be a Novel Aſſignment.

Parker Chief Juſtice: There was never ſuch a Plea as this, that *locus in quo ſuppon' tranſgr' præd' fieri fuit ſolum, &c.* for no Place is aſſigned in the *Narr'* but only the Vill laid for a *Venue*, the Plea ſhould be introduced *quod averia præd' præd' tempore quo fuer'* in *Blackacre*, which is your Freehold, and even then it would be a ſufficient Anſwer in this Caſe for the Plaintiff to ſay, that it was not in the Place where

you had pretended an Authority to take, the Plaintiff is put to his *Novel* Aſſignment only where the Treſpaſs complained of is neceſſarily local, and he cannot recover Satisfaction in any Place but that, but here is no Locality in the Declaration, and you cannot come and make that neceſſary afterwards which was not ſo at firſt. *Hob.* 176.

2 Lutw. 1402. 2 Brownl. 200.

Held where no Locality in the *Narr'* ſufficient to anſwer the Bar.

The whole Court held that here was no Locality in this Caſe, and therefore it was ſufficient for the Replication to anſwer the Bar, *& iſſint Judic' fuit dona pur le Pl'*. Sir *Peter King pro quer.*

Regina v. *Laughton.*

Seſſions of the Peace have no Juriſdiction of Uſury upon Stat. Car. 2. Antea 103.

THE Court quaſhed an Indictment for Uſury in taking above 6 *l. per Cent.* found at the Seſſions of the Peace, becauſe they have no Juriſdiction, which was ſaid to have been adjudged in many Caſes.

Mr. *Forteſcue* endeavoured to found a Juriſdiction on the Statute of Queen *Eliz.* 1. But *Parker* Chief Juſtice ſaid, that Act gives no general Power over Uſury, but only to put a particular Law in Execution, and in order to bring the Caſe within that, it ſhould be laid above 8 *l. per Cent.* it was objected that for ſo great a Crime the Defendant ſhould be put to demur.

But *Eyre* Juſtice ſaid, that Difference had been always taken, that want of Juriſdiction was

was a Cauſe to quaſh the Crime, which it will.

Et iſſint fuit Rule en ceſt Caſe.

Regina v. *Superviſor' Paroch' in Mancheſter.*

TWO Juſtices made an Order, that upon Sight thereof the Overſeers ſhould allow weekly to *Elizabeth Rediſh* of the ſame Pariſh, Widow, —— *per* Week, for the Relief and Maintenance of herſelf and four Children; and now upon the Return of a *Certiorari*, Exceptions were taken to it. 1. That *E. R.* is not alledged to be poor, *Trin.* 9 *Annæ*, *Int' Paroch' Rickſton & Paroch' Boſton.* 2. That the Children are not alledged to be Inhabitants of the Pariſh. 3. That they are not named.

Order of two Juſtices to pay a weekly Sum to *E. R.* for Maintenance of herſelf and four Children, quaſhed becauſe *E. R.* not alledged to be poor, nor Children to be Inhabitants. Mod. 220. Caſ. of Sett. Seſſ. Caſ. 55.

& Rem. 30. Str. 10.

The Court (*abſente Parker* Chief Juſtice) quaſhed the Order upon the two firſt Exceptions, but as to the third, *Eyre* Juſtice took a Diverſity between this and Orders of Settlement, for the latter muſt name all the Perſons, that the Overſeers may know whom to receive, but here the Money is all to be paid to the Mother.

Diverſity *enter* and Order of Settlement.

Mr. *Fazakerley* grafted another Motion upon this, to quaſh an Indictment againſt the Overſeers for diſobeying this Order, which was not ſet aſide as illegal, but it was denied becauſe

Order to be obeyed where not a Nullity.

because the Order was not a mere Nullity, therefore Obedience ought to have been paid to it whilst in Force; besides that the Order quashed could not appear to be the same in the Indictment.

Johnston un', &c. and *Altham.*

Prayer of *Jud' de Narr'* is in Bar, not Abatement. 10 Mod. 192, 210, 211. Antea 80.

PARKER Chief Justice delivered the Opinion of the Court.

The Declaration is the first Step in this Cause, but by Law that ought not to have been, therefore the Defendant may take Advantage of it by pleading, but the Question is, whether he has done it rightly in this Case.

There are two standing Forms of pleading.

1. In Abatement, wherein the Defendant *petit Judicium de billa vel de brevi, et quod cassetur.*

2. In Bar, *quod Narratio cassetur.*

The first of those would not serve in this Case, because it is repugnant to the very Matter of the Plea, which is the Want of a Bill.

The other is not proper, because it is in Bar and goes to the Merits.

It

It is praying Judgment of the Declaration, and this is the Reaſon that in all Caſes of Variance between the Bill and Declaration, the Plea demands Judgment *de Billa & non de Narr'*, though that at firſt View ſeems more proper ſince the Declaration made the Fault, but the Declaration being always taken to be the Plaintiff's Caſe, the Effect of the Plea is if this be your Caſe, you have brought a wrong Bill, purſued a wrong Remedy.

Declaration in the Plaintiff's Caſe.

Therefore, ſince neither of the ſtated Forms will anſwer this Caſe, the firſt being repugnant to the Matter pleaded, and the laſt demanding more than was proper, you ought to have gone out of the common Road, and prayed Judgment *ſi ad Narr' præd' reſpond' compelli debet*, and this was all that was poſſible to be done, and would have met the Plaintiff in the Beginning of his Suit.

Right Way of pleading wanting Bill.

Jackſon and *Amory*.

MR. *Forteſcue* for the Plaintiff inſiſted upon the Exceptions taken laſt Term to the Plea.

Action *ſur* promiſſory Note, Defendant pleads, *Stat.* 5 *Annæ*, that it was given to induce the Plaintiff to ſign Certificate of his Confeſſion to the Statute of Bankrupts. Antea 49.

As to the general pleading *decoctor devenit*, he ſaid it was both double and uncertain, for Bankruptcy inferred ſome Things certainly, and others uncertainly, that there are ſo many different Acts which make a Man a Bankrupt, that

that it is impoſſible to know how to apply Proof of it, upon that involved Expreſſion, *Specot*'s Caſe, 5 *Rep. Lutw.* 274, 454. That ſuch general Pleading is diſallowed in all Caſes. 26 *H.* 8. 1. 9 *Ed.* 4. 24. That this Plea works by Way of Releaſe and Diſcharge of a Demand, and therefore requires great Certainty. *Hob.* 296.

That the Defendant had not ſhewn himſelf to be ſuch a Bankrupt as was intitled to the Benefit of this Act, and he who would diſcharge himſelf from a Debt by Statute, muſt bring himſelf within the Qualification of it.

Mr. *Page contra:* That this was only Matter of Conveyance to their Plea, and need not be ſhewn with preciſe Certainty. 34 *H.* 6. *Mich.* 19 *H.* 8. 29. *Plowd.* 65.

Held the Defendant ought to aver his Conformity in all Parts of the Statute by Words of his Plea, and not only by ſetting out the Certificate.

The Court was of Opinion (*Mes J. Powys J. ſemble encountra*) that the Defendant ought to ſet forth his Conformity in all Things to the Statute, that it may appear to the Court, he was ſuch a Bankrupt as is intitled to be diſcharged, which not being done by Words in the Plea, but only under the Certificate of the Commiſſioners which was ſet forth, they held the Plea ill; *Eyre* Juſtice likened it to the Caſe of the Plea upon the Act for diſcharging of poor Priſoners, where the Defendant muſt ſhew himſelf out of all the Exceptions.

Parker Chief Juſtice ſaid, the Intention of the Act was, that it might not be in the Power of a Creditor, who had four Fifths, to diſcharge

discharge the Debts of the other fifth Part, unless he fairly discharge his own; but there would be no Danger of that unless the Bankrupt had so conformed himself, as to be intitled to be discharged by Certificate, for otherwise no Injury would be done to other Creditors by such Note, therefore he thought it would best inforce the Intention to make the Note good, where the Creditors would not be hurt by it, because it would be the greatest Punishment upon the Bankrupt who intended a cheat.

Jud' pro quer' nisi causa ante fin' Termini.

Jeffery and *Barrow.*

Debt *v.* Heir, Issue upon sufficient Lands by Descent before Original brought, Verdict *pro quer'*, but no particular Inquiry of the Value, as *per* Mod. 18. Post.

IN Debt against an Heir, the Defendant pleads *Riens per descent* at the Time of the Original purchased; the Defendant replied, sufficient Lands by Descent before the Original purchased, and *sur* Issue the Jury found for the Plaintiff, which was entered in the Words of the Replication, but no Inquiry of the Value of the Lands.

Stat. 3 & 4 *W.* & *M. c.* 14. 10

Mr. *Whitaker* in Arrest of Judgment. 1. That the Replication was ill, being not warranted by by the Common Law. *Plowd.* 440, 441. Nor by the Direction of the *Stat.* 3 & 4 *W.* & *M. c.* 14. which introducing a new Law ought to be exactly pursued. *Hob.* 289. The Words of the Act are, the Plaintiff may reply

reply, that he had Lands of his Anceſtors before the original Writ brought. 2. That by the expreſs Words of the Act there ſhould have been a diſtinct Inquiry of the Value of the Lands, after the Jury had tried the Iſſue, and the Want of it is Error; ſo on 17 *Car.* 2. as to Avowries. *Lev.* 255, 160, 118. *H.* 6. 25. *a.*

Mr. *Norcliffe pro quer'* endeavoured to ſhew that this was like the Caſe of an Executor upon Iſſue of *Plene adminiſtravit*, and that the Intent of the Act was anſwered by the Jury's finding the Sufficiency, in order to which the Value muſt neceſſarily be inquired.

J. Powys Juſtice inclined to think it was like the Caſe of perſonal Aſſets; but *Parker* and *Eyre* thought there muſt be a diſtinct Inquiry of the particular Value. *Parker* ſaid the Word *ſuffizien'* was immaterial in the Replication, and conſequently in the Verdict; *Ergo* it muſt be taken that there had been no Inquiry at all, that ſuppoſing that Word material, then the Iſſue joined in this Caſe was contrary to the Intent of the Act, for in Caſe it had been proved that he had Lands, yet if they were not ſufficient the Verdict muſt have been for Defendant, that this differed it from the Caſe of Executor, for his Plea being, that he has no Aſſets, if any are found that is falſified.

Adjournatur.

Bromfield

Bromfield v. *Launder*.

Debt upon Aſſignment of Bail Bond by Executor in *debet* and *detinet*.

AN Executor brought Debt in the *debet* and *detinet* upon Aſſignment, on *Stat.* 5 *An.* c. 16. of a Bail Bond for appearing to a Bill of *Middleſex*, *ad reſp' W. B. arm' de Pl'ito tranſgr' acetiam Billæ ipſius quer' ut Exec'*, &c. *J. S. pro* 1500 *l. de debito ſecund' conſ. Cur' noſtræ coram nobis exhibend'*.

On Demurrer to the Declaration Mr. *Branthwaite* argued, that this Action ought to purſue the Original one, and be brought in the *detinet* only. *Lane* 79. That it is a Conſequence of the firſt Cauſe of Action, which was in the Teſtator, *Sav'* 130. *Cro. Eliz.* 226. and that the Recovery will be Aſſets in the Hands of the Executor. *Roll. Abr.* 602. That is not helped by a Verdict. *Cro. Jac.* 545. That this is Subſtance, becauſe the *debet* and *detinet*, and the *detinet tantum*, is the only Mark to determine the Court, whether the Judgment ſhall be in his own Right, or as Executor, *Show.* 57. *pl.* 294. 11 *H.* 6. 16. that the Money recovered on this Bond would be a Satisfaction of the original Bond in Equity.

Mr. *Salkeld contra*: That *non conſtat*, that the firſt Action was in the Right of the Teſtator, for it might be proper to name himſelf Executor by Way of Inducement; but admitting that, yet this Bond was only in the Nature of a collateral Security; the Executor

cutor has it not *jure ſucceſſionis*; but the Aſſignment was made to him in his own Name, and he ſtands in the Place of the Sheriff. The Bail here is not for the Debt, but for the Non-appearance, and the Judgment will not be a Bar to an Action on the firſt Contract; the Caſe in *Cro. Eliz.* is an Eſcape, which is a Wrong done to the Teſtator's Eſtate, for the Body was a Pledge for the Debt.

Parker Chief Juſtice: I believe there will be no Occaſion for untying this Knot, for it may be cut; the Condition of the Bond is to appear in the firſt Place to anſwer the Plaintiff in an Action of Treſpaſs in his own Right, and then *ſecundum conſuetud' Cur'* to anſwer the Bill in Debt as Executor; for this Court has no Juriſdiction in Debt originally, but in whatever County the Court is ſitting you may have a Bill in Treſpaſs, and when the Party is brought in, a Bill may be exhibited againſt him in any other Action; for being in Cuſtody of the Marſhal of the Supream Court, he ſhall anſwer to all Matters there, ſo that this Bond is alſo Security for his Appearance in the Action of Treſpaſs, which is in the Plaintiff's own Right, and may be inſiſted on as well as the Bill in Debt; *Ergo* the Action well brought in the *Debet* and *Detinet*.

Jud. prò quer' quia the Bill of Middleſex *in tranſgr'* in his own Right as well as in Debt as Executor.

This Action is in the Law of the Sheriff.

L. Powys accord, Eyre nil dixit, J. Powys ſemble encontre. Per Cur' Judic' pro quer' niſi Cauſa ante fin' Termini.

Regina

Regina v. *Blagdon*, *Portgrev. Burgi de Honiton.*

INFORMATION againſt the Defendant, *Quo warranto* he claimed to be Portgreve of *Honiton*, and to have all the Liberties, Privileges and Franchiſes belonging to the ſaid Office *de quibus quidem Libertat', privilegiis & Franchesiis idem Georgius Blagdon ſuper dictam D'nam R'nam per tot' tempus præd' uſurpavit & adhuc uſurpat*; the Defendant pleaded and made Title upon the Conſtitution of the rough, *absq; hoc, quod Libertat,' privileg' & Franches' præd' ſuper dicta' D'na' Regin' uſurpavit & adhuc uſurpat*, and to that the Defendant demurred, and ſhewed his Cauſe.

Information *Quo warranto* for an Office and Franchiſes *eid. ſpectan'*. Defendant makes Title, and traverſes the Uſurpation, the Crown takes Iſſue upon the General Traverſe.

Mr. *Salkeld* for the Defendant: I ſhall firſt conſider the Information itſelf, and then the Iſſue taken in the Replication. Ante 6.

The Information is,

1. Uncertain as to the Liberties and Franchiſes claimed.

2. It has not expreſly charged an Uſurpation of the Office.

As to the firſt, the Words are general, *Lib'tat' Privileg. & Franch' Officio præd' ſpectan'*. Now Liberties are of ſeveral Kinds, and it is impoſſible to tell what theſe are, whether

1. Objection. Information uncertain as to the Franchiſe.

Cognizance of Pleas, Court Leet, *Aſſiſa bon' felonum*, Waifs, Strays, or Treaſure Trove, *&c.*

The Defendant may have a Right to the Office, and not to the Franchiſes that are claimed as belonging to the Office; as ſuppoſe he claims the Office by Preſcription, and *bona felonum* by Preſcription, and *Aſſiſa' panis* by Charter beyond Time of Memory of which no Allowance was ever had in ſuch Caſe, the Office is to be allowed, but the Franchiſes not; the Reaſon is plain, a *Quo warranto* is in the Nature of a ſeveral Writ for each Franchiſe, and there muſt be ſeveral Judgments according to the Nature of the Franchiſes. *Palm.* 5. *Rex* v. *Civitat' Dublin.* As to ſuch as the Crown may have, the Judgment is that they be ſeized into the *Queen*'s Hands; as to ſuch as the Crown cannot have, the Judgment muſt be that the Defendant be arreſted, and the Franchiſe be extinguiſhed. *Cro. Jac.* 250. *Rex* v. *Stanton*, *Mich.* 4 *Jac. B. R.* adjudged. *Mich.* 8. *Jac.* Therefore the Caſe of a *Quo warranto* differs from an Affize or *Mandamus* to an Office, for there the Office is the only Thing in Demand, and there can be but one Judgment.

Several Judgment in *Quo warranto* according to the Nature of the Franchiſe.

Differs from Affize or *Mandamus*.

All the Precedents of Informations are agreeable to this Notion, *Quo warranto clamat habere Lib'tat' ſequen'*, *viz.* and ſo ſets them forth. So is *Co. Ent.* 530. *& paſſim*, *Quo warranto* v. *Civit' London.*

No

No Inconvenience or Hardſhip can ariſe from this to the Proſecutor, for if the Attorney General is informed of an Uſurpation, but does not know the Nature of the Franchiſes which are uſurped, the Law has chalked out a proper Method for him to go in, for in ſuch a Caſe a Writ ought to iſſue out of this Court to the Sheriff of the proper County, ſuggeſting that the *Queen* is informed of an Uſurpation of Liberties, and commanding him to enquire thereof by the Oaths of twelve Men, and what they are to make Return, upon which Return there goes a *Diſtringas* againſt the Uſurper *ad oſtend' Quo warranto clamat, & ad fac. finem pro injuſt' uſu & occupatione Præmiſſ'*. So in the Earl of *Shrewsbury*'s Caſe, *Co. Ent.* 531. to 534. an Authority in Point, a Report of this Caſe is in *Noy* 121. Sir *H. Cheverell*'s Caſe, *Quo warranto tenuit diverſ. Lib'tat' Franchef'* without ſhewing what, *viz.* Waifs, Strays, *&c.* ſo as the Defendant might be able to make a particular Anſwer.

Et per Cur': It is nought for the Incertainty.

My ſecond Objection to the Information is, that here is no Charge of Uſurpation as to the Office, and therefore the Defendant not bound to anſwer it. Second Objection on Charge of Uſurpation of the Office.

Every Information in the Nature of *Quo warranto* ought to charge two Things; 1ſt, A Claim, 2d, An Uſurpation. 3 *Lev. Mich.* 29 *Eliz. B. R.* it has been held that in What an Information ought to charge.

a *Quo warranto* he claims to have Waifes, Strays, Wrecks, &c. *infra manerium suum de S.* the Defendant need not shew that he has a Manor, otherwiſe it is if it be *Quo warranto & ſure clamat S. fore manerium & bere Lib'tat'*, &c. but if it be not neceſſary to charge an Uſurpation, neither was it neceſſary to anſwer it, the Conſequence is, that if it had been material, it was not iſſuable.

Point whether the Crown can take Iſſue on the general Traverſe.

The principal Point is, whether the *Queen* can take Iſſue upon the general Traverſe *abſq; hoc, quod uſurp.* when the Defendant has ſet forth a Special Title.

This is a Matter of great Conſequence, and will make it hard for any Subject to defend a Franchiſe againſt the Crown. I have looked over many Precedents in Print, and can find nothing like it. I have looked into as many more in Manuſcript, and have not found one ſingle Inſtance of this Nature, but inſtead of taking Iſſue on the Traverſe, they all anſwer to the Special Matter. *Co. Ent.* 543, 530. *9 Co.* 23.

No Inſtance of this Kind.

If this might have been done, it is probable it would have been done one Time or other, for it is a ſhort eaſy Way, much ſafer than a tedious Replication and Surrejoinder, and yet as effectually ſerviceable.

In the Caſe of the City of *London* the Pleadings were carried unto a Surrejoinder, and all to ſhew a Forfeiture of the Franchiſes, which *Uſurpavit per totum tempus præd'* would have

have done as well; this is an Argument that former Ages thought this an Iſſue not to be taken in ſuch Caſes.

If the Defendant diſclaims, the Uſurpation may be material, for it may be that he has uſed the Franchiſe, whereas upon his own ſhewing he had no Right to it, and that is the very Gift and Suppoſal of the Information, and in ſuch Caſe Iſſue may be taken upon the Uſurpation. So in *Co. Ent.* 527. the Entry of a Diſclaimer is *Non uſi fuer' nec uſurpav'*, *ſed diſclamant*, *&c.* and ſo are all the other Precedents on the other Side where the Defendant claims, the Uſurpation is only Matter of Conſequence. He hereby admits the Uſurpation, but that being juſtified, a Right which warrants it can be no Uſurpation, for that, as it is defined in *Co. Litt.* 277. is an Uſurpation of a Royal Franchiſe without lawful Warrant. Where the Uſurpation may be material.

I would compare this to the Caſe of a *Quare imp.* where if the Defendant makes Title, he never traverſes the Diſturbance, but if he does not juſtify, but pleads *Ne diſturba pas*, the Plaintiff for Damages may take Iſſue upon that. So is *Paſch.* 26 *E.* 3. *pl'* 2. *Quare imp. v.* two; one of the Defendants was Vicar, and he pleaded *Ne diſturba pas*, and the other made Title, the Plaintiff *pur aver ſes* Damages replies to the Plea of the Vicar, *que diſturba*, and as to the Title took Iſſue upon this; the Plaintiff would have prayed Proceſs for Trial of the Diſturbance; but *per Cur'* the other Iſſue ſhall be tried firſt, for perhaps that may be found againſt the Plaintiff *en quel* Like *Quare imp.*

cas le Diſturbance ne ſerra riens enquire. But if the Iſſue be found for the Plaintiff, then the Diſturbance ſhall be tried.

So where the Biſhop claims nothing but as ordinary, this is a Diſclaimer, and the Plaintiff muſt ſhew a Special Diſturbance if he would take Advantage of it.

The Title a ſufficient Anſwer without a Traverſe.

My ſecond Ground is that in Caſe of a Franchiſe, where the Defendant has a Right, the Crown cannot be uſurped upon, and therefore if he ſhews a Title, it is a ſufficient Anſwer without traverſing the Uſurpation.

The Information ſuppoſes a Uſer without Right; if there be a Right it is no Uſurpation, but a lawful Uſer, and therefore in that Caſe to go to Iſſue upon an Uſer, where it is confeſſed and juſtified, is needleſs and impertinent. It is ſomewhat like the Caſe in this Court of *Aſton* v. *Sherman*, *Mich.* 9 *W.* 3. in Debt on a Bond *v.* Executor, the Defendant pleaded ſix Judgments for 100*l.* and *Riens ultra* 10*l.* to ſatisfy; the Plaintiff replied as to the five Judgments, that they were kept on Foot *per fraudem*, and to the ſixth, that he had *ultra*, *& hoc petit quod inquir' per patriam*; there the Court ſaid that he that pleads Judgments confeſſes Aſſets *quoad* them. So that the Defendant had confeſſed 500*l.* in his Hands, therefore it was driving the Defendant to an unneceſſary Iſſue of a Matter confeſſed. So here it is driving the Defendant to an impertinent Iſſue.

Such Iſſue would be impertinent.

This

This will appear yet plainer from the Nature and End of a *Quo warranto*. Nature and End of a *Quo warranto*.

A *Quo warranto* is founded on a Right the Crown has to know by what Title the Subject uſes a Liberty or Franchiſe, and this is becauſe all Franchiſes flow from the Crown, and if there be no Grant, then the Uſe of the Franchiſe is uſurping an Authority which he has not, and every Inſtance of Uſer is an Act of Oppreſſion upon thoſe over whom he exerciſes it; but the *Quo warranto* neither ſuppoſes that the Crown has a Right to have the Franchiſes in Queſtion, nor that it had a precedent Poſſeſſion, and therefore though the Crown has no Right, yet if the Defendant has no Right, Judgment ſhall be againſt the Defendant. So is 2 *Leon.* 28, 212. *Partridge's* Caſe, 3 *Cro.* 125. but in thoſe Books it is only ſaid *obiter*, but *Trin.* 32 *El. Rot.* 44. *Rex* v. *Vaghan*, the very Caſe happened; it was a *Quo warranto* for Waifs, *bona felonum*, *&c.* the Defendant pleaded that the Abbot of —— was ſeized of the ſaid Vill, and that he and all his Predeceſſors Time out of Mind had Waifs and Strays. And for Felons Goods he pleaded that the ſaid Abbot *licite habuit & gaviſus fuit* the ſaid Franchiſe *uſq;* 24th *Feb.* 27 *H.* 8. *in jure Abbatiæ ſuæ*, that by the Stat. 27 *H.* this Abby came to the Crown. Then he ſhews the Stat. 32 *H.* 8. *c.* 20. of Revivor, that *H.* 8. granted to *Darcy*, who enfeoffed the Defendant; *Et eo warranto* he claimed. *Coke* took this Exception, that the *bona felonum* being not appendant could not paſs by the Feoffment from *Darcy* to *Vaughan*,

if there was not a Deed of Feoffment, becauſe thoſe Liberties of *bona felonum* lie not in Preſcription, but in Grant only; the next Queſtion was whether it remained with *Darcy* the Feoffor, or was extinguiſhed; *et per Cur'*: Be it one Way or other, Judgment muſt be for the *Queen*, becauſe the Defendant does not make Title to himſelf.

Quo warranto differs from an Information of Intruſion.

Hence it appears that a *Quo warranto* is in the Nature of a *Quo jure*, and therefore differs from an Information of Intruſion, for that is founded on a precedent Right, at leaſt a precedent Poſſeſſion, in the Crown, and therefore in this Caſe the Defendant may be guilty, tho' he has a Right; for let his Right be what it will, if he enters upon the Poſſeſſion of the Crown, he is an Intruder; and for this Reaſon it is that in an Information of Intruſion, if the Defendant pleads a Title, he muſt alſo traverſe the Intruſion, and the Attorney General may take Iſſue upon that Traverſe. 3 *Co. Heydon's* Caſe. So in an Information of Intruſion one may plead *Non cul.* *Paſch.* 11 *Car.* 1. *Rot.* 156. *in ſcaccario*, *Rex* v. *Routh & al'*. But in an Information *Quo warranto* one cannot plead *Non uſurpavit*. Sir *Jervis Clifton's* Caſe, 3 *Leon.* 184. 4 *Leon.* 199.

One may be an Intruder, though he has Right.

In theſe Caſes I ſay the Crown has a precedent Poſſeſſion, and may be intruded upon though the Defendant has a Right, but here the Crown never had a Right to or Poſſeſſion of the Office of Portgreve, and therefore cannot be uſurped upon if the Defendant has a Right.

There-

Therefore from the Nature of the Thing, the Defendant in a *Quo warranto* gives a ſufficient and compleat Anſwer, if he ſhews a good Title, without a Traverſe of the Uſurpation, becauſe where the Defendant has a Right the Crown cannot be uſurped upon.

But the having Right cannot be an Uſurper.

The Informations of *Quo warranto* are a late Inſtitution, which came in upon a Ceſſation of Eyres, which happened 12 *Ed.* 3. and they are formed to anſwer the Deſign and End of Proceedings in Eyre before that *Quo warranto's* were either determined before Juſtices in Eyre or at *Weſtminſter*; by original Writ of *Quo warranto*, it was then held that Pleas of Franchiſe could not be held but upon the original Writ. Stat. 5 *Ed.* 1. *c.* 1. 2 *Inſt.* 279. *Et ſi peradventure les Parties excepterunt* that they ought not to anſwer (as to their Franchiſes) *ſans briefe original*, yet if an Uſurpation appears, the Juſtices ſhall proceed. 18 *Ed.* 1. Stat. de *Quo warranto*. Lord *Coke* 2 *Inſt.* 498. ſays, that with Juſtices in Eyre this Branch lived, and with them it died.

Information *Quo warranto* came in upon the Ceſſation of Eyres.

I will not go farther upon this, though a great deal more may be ſaid, becauſe I make only this Uſe of it, that Informations of *Quo warranto* coming in to ſupply the Proceedings in Eyre, were formed to anſwer the ſame End and Purpoſes, and I cannot find that the Uſurpation was ever traverſed or inſiſted upon in the old Eyres, wherever the Defendant juſtified, nor could it be in the Nature of the Thing.

And were formed to anſwer the ſame Ends.

This Iſſue could not be taken there.

Before

Method of proceeding in Eyre.

Before the Eyre there went a general Proclamation, by which all Persons claiming Liberties were commanded to appear at a Day, and shew what Liberties they claimed.

This Proclamation was called a general *Quo warranto*, and if the Party came in, he might put in a general or particular Claim.

The general Claim shewed only what Liberties he claimed, and what Estate he claimed in them; the special one set forth not only what Liberties and Estate, but the very Title by which he claimed.

Now where the Party exhibited a special Bill of Claim, containing the Nature of his Liberty and Title, the Attorney General did not file a *Quo warranto*, but pleaded to the Claim either by demurring to or traverfing the Title; in this Case it was impossible to bring the Usurpation in Question, but by alledging new Matter, as Misuser or Nonuser, which was done by an Allegation in Court.

Application to this Case.

So here, when the Defendant has confessed his Claim, and shewed his Title, the Usurpation ought not to come in Question, unless the Attorney General confessing that, had alledged a Misuser. The Title is the Matter, unless that Title be avoided, for otherwise it is idle and immaterial to set it forth.

It is somewhat like a Declaration in Attachment on a Prohibition for proceeding *post prohi-*

prohibitionem Regiam deliberat, the Defendant pleads he did not proceed *post, &c. Mich. 6 Ja. 1. Lonſdale's* Caſe.

Every Defence is either by demurring, denying, confeſſing and avoiding, or alledging different Matter. Several Kinds of Defences.

Demurring is inſiſting on the Inſufficiency of the Charge.

Denying is pleading Not guilty.

Confeſſion, as in Juſtification for Words, 4 *Co. Cromwel's* Caſe. So in *Quare imp.* if the Defendant makes Title, he never traverſes the Diſturbance, and yet he may plead *Ne diſturba pas. Mich. 2 Ed. 3. pl. 7.* Avoidance, as in Caſe the Defendant pleads *Liberum tenementum*, and the Plaintiff replies a Leaſe for Years; ſo of alledging different Matter. In all theſe Caſes the Defendant's Plea is a full Anſwer of itſelf without a Traverſe, therefore a Traverſe is naught.

But where the Defendant pleads inconſiſtent Matter, he muſt traverſe, becauſe the Plea would not be a full Anſwer without it. Traverſe where neceſſary in a Defence.

It is the Traverſe that makes the Anſwer compleat and full, and therefore the Law rightly calls what went before, Inducement, and the Traverſe in ſuch Caſe is a Waiver, and Iſſue muſt be taken upon that.

But

But then that Iſſue is joined upon Matter of Fact. Here it will not be joined upon Matter of Fact, for that which is referred to the Jury will be whether the Defendant be an Uſurper; that is not a Matter of Fact; for an Uſurper is not he that uſes a Liberty, but he that uſes it without Right.

When the Uſer is admitted, Uſurpation is not a Matter of Fact, but a Point of Law.

No Judgment would be given on this Iſſue, unleſs new Matter be given in Evidence, as Miſuſer, *Non*-uſer, Judgment in a former *Quo warranto*, Surrender, Extinguiſhment *del Corporation*, and if this may be, it will be impoſſible to defend Liberties.

If the Attorney General may reply *Uſurpavit*, why may not the Defendant plead the general Iſſue?

In this Caſe there are Precedents for us, but none againſt us.

And ſome there are where this Traverſe has been omitted. Earl of *Shrewsbury*'s Caſe, *Co. Ent.* 531. *Banks*, Attorney General, *v. Com' Danby & al', Trin.* 11 *Car.* 1. *Rot.* 49. *in Scaccario, Quo warranto clamant habere Wreccu' maris int' Whitby Stroud & Scarborough, piſces regales* ——, *&c.* Defendants plead a Title to the Abbot of *Whitby*, and the Abby came to the Crown, and derive it to themſelves, and conclude *& eo jure & warranto clamant prout eis bene licuit, quæ omnia, &c. parati ſunt verificare*, &c.

1. Sir

1. Sir *Peter King*, *contra*: As to the first Exception to the Information he admitted, that if an Information *Quo warranto* were brought for several distinct Franchises, then there might be different Judgments, but he distinguished this Case from that, the *Lib'tat' privileg' & Franch' offic' præd' spectan' & pertinen'* were Words of Surplusage, and included no more than what was incident or appurtenant to the Office, and if the Defendant had a Right to the Office, consequently he had a Right to every Thing *spectan'* to that Office, *& sic vice versa*, so that there was no Possibility of different Judgments upon this Record.

Different Judgments cannot be on this Information.

2. As to the Objection, that there was no express Charge of an Usurpation of the Office, he said the constant Form had been to conclude as here, *de quibus quidem Lib'tat' & Franches'*, *&c.* and these Words had been always taken to extend to the Office, which is a Franchise.

Franchise, *&c.* extends to the Office.

As to the principal Question, whether the Replication was good; he observed that the Crown did not traverse any Thing, but only took Issue on the Traverse in the Defendant's Plea, which differed it from the Earl of *Shrewsbury*'s Case. So that the Defendant had tendered an Issue, and yet it was insisted that the Crown could not take Issue upon it.

Traverse in Tender of an Issue, and the Crown may take Issue on it.

That this was very plain from the Authorities in *Co. Ent.* 672, 3. *Co. Ent.* 375. *b.* that in any Information of Intrusion, when the Defendant

Defendant concludes with a Traverſe, the Crown may take Iſſue upon it, and that this had been admitted by the other Side, but an Attempt made to diſtinguiſh it from the Caſe at Bar; but that it was a Diſtinction without a Difference, for the Crown had a precedent Right to this Office; that all Power being derived from the Crown, there could be no Franchiſe, but muſt have its Beginning there, and therefore the Reaſon is ſtronger in this Caſe, that the Party ſhould make a good Title againſt the Crown.

No Difference between Information *Quo warranto* and Intruſion, as to this.

At Common Law, if the Defendant in Intruſion pleaded *Non intruſit* generally, the *King* ſhould be put into Poſſeſſion immediately, though the Defendant might have a good Title, 4 *Inſt.* 11. *b.* *Dyer* 238. but this was altered by 21 *Jac.* 1. *c.* 14. The true Reaſon of it was, that the Crown's Title appeared in the Information, and therefore the Defendant muſt make a good one againſt it.

That the Crown is intitled to certain Privileges in Pleading, which no common Perſon has. So in *Monſtrans de droit*, *Pro Prerog.* 9. 55. 3 *H.* 7. 3. *Plowd.* 243. the Crown may either maintain its own Title againſt the Traverſe of the Party, or deny the Party's Title.

Wherever the Crown has a Right, that Right is the Common Law of the Land, and therefore the Party muſt make a certain Title againſt it.

Hil. 23 *Eliz.* *Rot.* 1. *Regina* v. *Wallet*, Information for uſurping a Court Leet, the Defendant made Title by his Manor of *W.* Part of a Priory, to which a Leet belonged, *abſq; hoc, quod Uſurp' modo & forma, & abſq; hoc,*

hoc, quod utitur alibi quam infra manerium de W. The Attorney General replied, *Quod uſurp. modo & formâ*, as here, and a *Ven. fac.* awarded upon the Roll, but no Judgment, the Party dying before Trial.

Mr. *Salkeld* (Reply): That the only Uſe of the Traverſe is to let the *King* in to avoid the Title by replying a Miſuſer, if he thinks fit.

Traverſe only to let in the Crown to reply a Miſuſer.

Parker, Chief Juſtice, ſaid, the Caſe of Intruſion ſeemed to be quite different, becauſe there a precedent Right of the Crown is ſet forth, but here the Crown could not be preſumed to have a precedent Title, ſince probably there might be no ſuch Office, that in *Monſtrans de droit* the Party comes to take away the Poſſeſſion of the Crown, but tho' the Crown ſhould have no Right, yet it ſhall keep the Poſſeſſion againſt every Body not having a good Title.

Intruſion, Difference becauſe the Crown has no precedent Right in this Caſe.

He ſaid the Streſs of the Matter lay on this, whether the Traverſe was material or not; if it was immaterial, then it amounted to no more than this; I have this Right, therefore I am far enough from uſurping upon the Crown.

Main Point, whether the Traverſe material or not.

That the Precedent produced in 23 *Eliz.* was the ſtrongeſt Inſtance poſſible againſt them, that in all Records no more than one could be found, and upon that no Judgment, and therefore probable to have been arreſted.

J.

J. Powys Juſtice: That he never thought this Traverſe was any Thing but a reſpectful Way of concluding the Plea to the Crown; that it would be very hard upon the Party, that the Attorney General ſhould be left at large to give any new Matter in Evidence.

Ulterius conſilium proxᵃ Termino.

N. B. No Precedent of a *Quo warranto* by Information in the old Entries, or in *Raſtal.*

Regina v. *Evans.*

Certiorari to the Grand Seſſions of *Wales* diſcretionary in the Court.

UPON a Motion to ſtay the Filing the Return of a *Certiorari* to the Grand Seſſions of *Wales*, it was held by the Court (*abſente L. Powys* Juſtice)

Firſt, That a *Certiorari* will lie to move an Indictment before the Juſtices of the Grand Seſſions into the Court of *Queen's Bench*, by Reaſon of the ſupreme Juriſdiction of the Court.

Secondly, That the granting ſuch *Certiorari's* is diſcretionary in the Court, and that they will not do it without ſpecial Cauſe, whereby it ſhall appear that Juſtice requires ſuch Removal.

Thirdly, That the Juſtices of the Grand Seſſions cannot take a Recognizance of the Defendant

Defendant for Coſts, by the *Stat.* 21 *Jac.* 1. *c.* 8. for the Juſtices of Peace being named only in that Statute, it cannot extend to the Juſtices of the Grand Seſſions.

Fourthly, That the Court may upon ſuch *Certiorari* take a Recognizance of the Defendant according to their Diſcretion.

Vent. 93, 146. *Gro. Car.* 332. 2 *Keble* 685.

Regina v. *Paroch' Stæ. Marthæ Arbing' in Surry, Mich.* 12 *Annæ, rot.* 14.

A Woman was ſent by a bad Order of two Juſtices to *M.* as the Place of her laſt legal Settlement, afterwards quaſhed, and there was delivered of a Baſtard, and by Order of Seſſions the Child was adjudged to be ſettled in *M.* which was now returned on a *Certiorari*, and quaſhed *per Cur'*.

Order of Settlement quaſhed. Caſ. of Sett. & Rem. 65.

Regina v. *Brathorp Hulfley, Lincolnſhire.*

Order to receive poor Perſons till Quarter-Seſſions.

ORDER of two Juſtices adjudged *B.* to be the Place of his laſt legal Settlement, theſe are therefore to require, *&c.* to receive him till the next Quarter-Seſſions, which was confirmed by Order of Seſſions. Both Orders being returned upon a *Certiorari* were quaſhed *per Curiam.*

Regina v. *Turner.*

Return to *Certiorari* quaſhed *quia* Record not well deſcribed. *Vide Barnardiſton* v. *Fouliger.* Antea 125.

CERTIORARI to remove an Indictment *verſus A.* and *B.* and the Indictment returned as *verſus A. B.* and *C.* it appeared by Affidavit that *C.* was dead, but that was not made Part of the Record, the Court ſaid the Deſcription of the Indictment muſt be exact, and *ergo* quaſhed it.

Parker

Parker v. *Langley.*

PARKER Chief Juſtice delivered the Reſolution of the Court.

The Plaintiff declared that the Defendant, maliciouſly deſigning to oppreſs her, and cauſe her to be held in Priſon for want of Bail, and to deter her Friends and Neighbours from becoming Manucaptors for her, *Trin.* 10 *Annæ* proſecuted a Bill of *Middleſex* out of the *Queen's Bench* againſt the now Plaintiff, at his the Defendant's Suit in a Plea of Treſpaſs, *acetiam Billæ ipſius Will'i verſus præfat' Franciſca' pro Cent' libris ſuper aſſumption' ſecundum conſuetud' Cur', &c. exhibend'*, and 22 *June* the ſame Year *falſe et malicioſe et abſque aliqua juſta vel probabali cauſa* cauſed and procured her to be arreſted thereupon, and kept in Priſon for three Days and Nights for want of Manucaptors, *ubi revera* at the Time of taking out the ſaid Bill of *Middleſex*, or at the Time of the ſaid Arreſt, he had not *aliquam legitimam cauſam actionis verſus præd'* the now Plaintiff, *ad damnum Cent. libr'*. The Defendant demurs, and amongſt other Things ſhews for Cauſe, that the Plaintiff had not ſhewn in what Manner the ſaid *W.* proſecuted his ſaid Suit, or whether the ſaid Suit be diſcontinued or yet depends undetermined, or whether he ſaid *Frances* were any way diſcharged or acquitted therefrom, or what was done upon the ſaid Arreſt.

Middleſex, ſ. Caſe for malicious holding to Bail in a Civil Action declared ill on Demurrer for want of ſhewing what became of the firſt Action. 10 Mod. 145, 209. See Danv. Abr. 208. pl. 5. 213. pl. 3. Raym. 176. Saund. 228. Vent. 12, 18, 19. 2 Keb. 473, 476, 497. 3 Keb. 118. Lev. 269, 275. Mod. 4. Sid. 124. Salk. 15. 2 Salk. 456. 6 Mod. 262. Hob 267. Yelv. 117. 5 Mod. 223, 224. 12 Mod. 273.

The Plaintiff has joined in Demurrer.

And we are all of Opinion that the Declaration is inſufficient, for not ſhewing what became of the ſaid former Suit now complained of.

The Applying in a Civil Action to a Court of Juſtice for Satisfaction or Redreſs has been ſo much favoured, that no Action has ever been allowed againſt a Plaintiff for ſuch Suit ſingly and directly, on Pretence of its being falſe and malicious.

In the moſt odious of all Actions, appeal of Death, and in the moſt odious Caſe a Conſpiracy to bring it, an Action of Conſpiracy was never brought againſt the Plaintiff in the Appeal, but only againſt the Proſecutors, and all the Writs in the *Regiſter* run *procuravit*.

An Action upon the Caſe has not yet ſucceeded (whatever in ſpecial Caſes they muſt do) but only where the Plaintiff in the firſt Suit made the Courſe of the Court, requiring ſpecial Bail, a Pretence for detaining another in Priſon, and where the Malice was ſo ſpecially charged, that it appeared that the End of the Arreſt was not the Expectation of Benefit to himſelf by a Recovery, but a Deſign of impriſoning the other.

Therefore, to ſupport the preſent Action, it muſt be ſhewn that the former was both falſe and hopeleſs, and merely for another Purpoſe.

Now

Now as the Plaintiff has declared here of a Suit begun to a very ill Purpoſe indeed, and as ſhe ſays without Cauſe, and ſtopping there, conſidering under what Uncertainty ſhe has left it, ſince it may ſtand in any one of theſe Poſtures, ſome of which are actionable and ſome not, for ought appears it may be,

1. That the Suit is determined, and either.

1. The Plaintiff prevailed, and has his Judgment.

2. The Defendant diſcharged.

1. By Diſcontinuance.

2. By Nonſuit.

3. By Judgment.

2. The Suit may be deſerted, and the Plaintiff never declared upon it or proceeded further.

3. It may be ſtill regularly going on, and conſequently the Event be uncertain, whether the Plaintiff ſhall in due Time recover his Demand or fail.

1. If the Suit be determined in Favour of the Plaintiff, this is Colour for his Action.

1. In Favour of the Defendant, there may be Room when the Suit appears not juſt, to enquire how far it was malicious and oppreſſive, and deſigned for a wicked Purpoſe.

2. If it be deſerted.

It is the Caſe whereupon moſt of the Actions have been founded, for when a Man arreſts another and keeps him in Priſon for want of Bail, and whether he has either got Bail or his Body to anſwer, never proceeds further, it very properly lets in an Averment, that the impriſoning the other was the full Deſign of the Writ, and not any Expectation or Hopes of Succeſs; nay it is in ſome Sort an Owning, that he ſued not to redreſs himſelf, but to oppreſs the other, ſince when that End is attained by Impriſoning the other, he proceeds no further.

But when the Suit is neither determined nor deſerted, but is regularly going on, it is too early to ſay it is falſe or hopeleſs, and nothing could be more diſorderly and out of Courſe, than to try in a collateral Action what will be the Event of a Suit, which is yet *ſub judice* and regularly proceeding.

2 Rep. 3. 9. And then the Conſequence is plain, that the Plaintiff in this Action muſt ſhew the former Suit to be determined, and determined in her Favour, or deſerted, to let her into the Averment of its being falſe and malicious.

It

It is the Answer given to the King by all the Judges of *England*, *Quod nulla sequet' pœna, non intelligitur, &c. quousque terminetur, et tunc amerciamentum Regi.*

For which Reason the first Words shew only nothing can be done against the Plaintiff pending the false Suit, *Non intelligitur* to be *quousque terminetur*, which holds to this Day.

The last shew why he should not be punished after, and this holds too, except in some special Cases, where Satisfaction is sought not directly for the Suit, but for the holding to Bail or some special Oppression, where the Suit is only made a Pretence for it. *Dyer* 225. in Lord *Beauchamp's* Case.

It is indifferent to say whether an Action be true or false, *quamdiu secto pendet indiscussa.* My Lord *Hobart*, who carries Actions for malicious Suits farther than any one either before or since, yet allows this Rule.

Ins' Walcrer v. Freeman, Hob. 266. He lays it down as his first Caution in those Actions, that the new Action is not to be brought till the first be determined, because (says he) till that, it cannot appear to be unjust.

Which he observes to be the Reason given by the Judges, 2 *R.* 3. 9. and he says the Reason is, that a Writ of Conspiracy lies not till the Defendant be acquitted, but of that Salk. 15.

it is but one Reaſon, unleſs he take Acquittal in a looſe Senſe, as it is a Determination of the Proſecution, as I believe he did, and it might be ſhewn many of the Ancients did.

This holds equally in criminal Proſecutions, *M. 5 Jac. B. R. Arundel* v. *Arundel, Yelv.* 116. Action for exhibiting an Indictment, ſhews not what became of it, and therefore Exception taken to the Declaration, becauſe if nothing was done upon it, the Plaintiff would clear himſelf too ſoon, *viz.* before the Fact tried, which would not be convenient, *quod fuit conceſſum.*

Objection: There are Caſes where it has not been ſhewn the former Proſecution was determined, and yet the Plaintiff had Judgment, though the Exception was taken.

1. On Judgment.

Mich. 12 *Car.* 2. *B. R. Wine* v. *Ware, Sid.* 15.

In an Action for a malicious Indictment, Exception, it is not ſhewn that either he was acquitted, or that *Ignoramus* was returned upon the Bill.

2. On an Action.

Paſch. 21 *Car.* 2. *B. R. Skinner* v. *Gunton et al', Saund.* 228.

Action

Action for malicious holding to Bail, *Non culp.* pleaded, and Verdict for the Plaintiff, and Exception taken that he ſhewed not the former Suit determined by Nonſuit, *&c.* or Verdict againſt the Plaintiff, and without that he had begun his Suit too haſtily; yet in both theſe Caſes the Plaintiff had Judgment.

Reſp. The Anſwer to the Exception in both theſe Caſes was, that it was aided by the Verdict, but both of them allow it, at leaſt do not diſallow it on Demurrer.

In the firſt the Reaſon is thus aſſigned by *Twiſden* Juſtice, the Jury having found it to be falſe and malicious, it is well enough, otherwiſe (as it ſeems) on Demurrer.

In the latter the Anſwer is ſet down thus in *Saunders*, perhaps a good Exception on Demurrer, but cleared by Verdict, and in the Report of that Caſe in 2 *Keble* 467. it is expreſly ſaid, that the Plaintiff ought to give in Evidence what became of the firſt Action.

So that the Caſes are rather farther Authorities, that the former Suit muſt be ſhewn to be determined before this Action be maintainable.

Objection: The Report of that Caſe in *Vent.* 12, 19.

The

The Court inclined to diſallow the Exceptions, becauſe the Ground of the Action is the malicious holding to Bail.

Reſp. Whether well or ill done, to hold him to Bail depends upon the Event of the Suit.

That Anſwer is not ſufficient.

Unleſs it be uſed as an Argument that the Verdict would cure it, becauſe finding falſe and malicious *et ea intentione*, only to oppreſs the now Plaintiff and detain him in Priſon, and without any probable Cauſe, imply they were ſatisfied that the Suit was over and determined againſt the Party, or quitted by him.

Objected that in the latter Part of that Report in *Saunders*, the Court did not regard whether it was determined or no, for if the Defendant would have Advantage of that he ought to ſhew it, but now he has paſſed that Advantage.

Reſp. This is odd and almoſt repugnant, indeed, if it were determined by Judgment for the now Defendant to recover, he might well enough plead it in Bar.

But if it was yet pending, how muſt he plead, if it would be but in Nature of a temporary Bar, ſaying that the Falſity and Malice is not yet examinable, and why, becauſe it is yet depending, *i. e.* is yet as the Plaintiff

Plaintiff has described it to be, who has shewn it to be begun and not ended, which surely is not necessary for the Defendant to shew, but the Plaintiff who has shewn it to be begun, and would take Advantage of the Falsity and Malice, ought to shew such a Change in the State thereof as is necessary to intitle him to alledge Falsity and Malice, which in a Suit still carrying on he cannot do.

And I cannot but say on this Occasion, I think that great Man and accurate Reporter a little too tenacious in that Case, and being over fond of his Objection, he has not set forth the full Strength of the Answer given to them; for he persists that though an Action upon the Case would lie against the single Defendant upon the Case there, yet the Action there brought was not maintainable, which he says was an Action of Conspiracy, by Virtue of the Words *Conspiratione inter præhabita*; 2 *Keb.* 476. has preserved the plainest Answer in the World given to him, that though the Words of the Declaration be the same, yet whether the Action be Conspiracy or Case would be determined by the Title, which is certainly true, and removes all Doubts in that Case, for the Title in Conspiracy is *de Pl'ito transgr' et conspirationis contra formam ordinationis in hujusmodi casu provis'*. *Rast.* 124. *M.* 3 *Jac.* 1. 292. *Stockdale* v. *Fisher*, the same adding the Word *Edit'* and so long ago as *M.* 13 *Ed.* 2. 401. *W. de Blampæyn et al' attach' fuer' ad respond' W. Bartale de Pl'to conspirationis et transgressionis*, omitting *contra formam ordinationis*.

And

And in that Caſe of *Skinner* and *Gunton*, the Title is *de Placito trangreſſionis ſuper caſum*, which could not be turned into another Action by the Declaration; where the Title is in one Action, the Declaration cannot make it another, if the Title be Caſe, the Declaration cannot make it Debt, but may make it a fatal Variance; but in this Caſe it would not do even that, but all would be well enough, and ſo it is adjudged in *Cranbank*'s Caſe. 2 *B. R.*

This by the Bye. To return.

It would be improper to require the Defendant to plead the former Suit pending, which neither denies the Falſity, Malice, or any other Fact alledged in the Declaration, nor avoids it.

Indeed if the Plaintiff ſay the Suit is determined, or deſerted, it is a proper Anſwer to ſhew it proſecuted and depending, or falſifying the Declaration, but otherwiſe it ſpeaks not to the Point.

Objection: There are other Caſes where it is not ſet forth what became of the firſt Suit, and no Exception taken; but the Plaintiff had Judgment.

1 *Gray* v. *Day*. 2 *Jones* 132. *Raym.* 418.

Malicious Citation of Churchwarden in the Eccleſiaſtical Court to Account, ſeems that he had given in his Accounts before, and the Pariſh

riſh allowed them; not ſet forth what became of the Proſecution.

Reſp. After a Verdict.

2. *Draw* v. *Swain*, *Sid.* 429. 2 *Keb.* 546.

Action for that the Defendant having cauſed the Plaintiff to be arreſted upon a Bill of privilege at his Suit, where no Sum is mentioned, to the Intent to deter People from being his Bail, *falſe* and *malicioſe dixit* to the Bailiff of *Weſtminſter* who had arreſted him, that his Cauſe of Action was 600 *l.* *&c.*

The Defendant pleaded, that the Plaintiff was indebted to him 40 *l.* and traverſes the Saying, the Cauſe of Action was 600 *l.* Verdict for the Plaintiff.

Not ſaid what became of the firſt Suit.

Reſp. 1. After Verdict.

2. He admitted that he deſigned not the Suit for Recovery of more than 40 *l.* for that is all he pretends he was indebted, ſo he has yielded the Pretence of 600 *l.* due to be falſe.

3. *Stovers* v. *Damington*, 2 *Keb.* 753.

For malicious holding to Bail on *acetiam* 100 *l.* *ſuper ſe Aſſumpſit*, Plea, Cauſe of Suit Breach

Breach of Covenants in a Deed, whereby he was endamaged 100*l.*

On Demurrer Court held Breach of Covenant no Excuſe.

No Exception that he ſhews not what became of the firſt Suit.

Reſp. Reaſon why the Plaintiff ought to ſhew the firſt Suit determined or quitted, is to let him in to alledge Falſity or Malice.

Here the Plea quits it, owns it falſe and hopeleſs, ſo that the Defect of the Declaration is cured by the Plea.

For when the Party owns he cannot ſucceed in it, it is no Matter what is become of it; all the other Caſes on malicious Actions which are reported ſhew the Suit at an End, or deſerted.

H. 36, 37 *Car.* 2. 1 *Jac. c.* 13. *Webſter* v. *Haigh.* 3 *Lev.* 210.

Arreſt, *et quouſque* he gave Warrant of Attorney to confeſs Judgment, ſo could be no Trial in that Action, the Suit was at an End.

Trin. 29 *Car.* 2. *B. R. Collins* v. *Beale,* 9 *Keble* 781.

Caſe for malicious Arreſt upon a Writ of Privilege, it was obſerved that the firſt Writ was 26 *May* 28 *Car.* 2. and the Declaration in the

the Action which complained of it, is of *Trin.* Term following.

I know not whether theſe Actions have not in ſome Meaſure been allowed upon the Reaſon of the Statute of 8 *Eliz. c.* 2. ſo that what that Act declares to be Injuſtice and vexatious, and orders a Judgment to be given for Coſts and Damages thereupon, ſhould afterwards be likewiſe in thoſe Caſes at the Election of the Party, or in other like Caſes to be the Foundation of an Action upon the Caſe to recover Damages, and that Statute enacts that the Defendant ſhall have Coſts and Damages awarded him, if the Plaintiff declares not within three Days after Bail put in the Caſes within the Statute.

Therefore I will ſtate it a little more fully as it is upon the Record, *Trin.* 28 *Car.* 2. *Rot.* 38. The Plaintiff declared that the Defendant, Clerk of Sir *Robert Henley*, *nequiter et malicioſè intendens præfat' Joh'em Collins ſub colore & prætextu legalis proceſſus indebitè et injuſtè vexare et opprimere, ac de lib'tate ſuâ deprivare*, &c. cauſed the Plaintiff to be arreſted upon a Writ of Privilege, *ac etiam pro* 50 *l.* whereupon he was detained in Priſon a whole Day, *eâ intentione* to force him by a Dureſs of Impriſonment to certain unjuſt Agreements and Compoſitions with the ſaid *Beale*, or to find *maximè ſufficien' Manucaptor'*, *ubi revera* the ſaid *Collins* was not indebted, &c. nor had the ſaid *Beale* any juſt Cauſe of Action, *et nec præd' E. Beale in præd' Term' Paſch. ret' præcepti præd' ſeu unquam poſtea hucuſque in*

aliquo

aliquo hujuſmodi Pl'ito ſeu actione v. *præd' J. C. Narravit.* Upon Demurrer Judgment is for the Plaintiff.

Here is a ſpecial Deſign charged, and here is that End of impriſoning the now Plaintiff attained, and then the Party lies by, and proceeds no further.

He that impriſons another, and goes not on with a freſh Purſuit, gives ſufficient Ground for the other to alledge it to be only for Vexation, and if he doth not go on, nor make that firſt Step which is always in his Power, he ſhall not ſkreen himſelf from the other's demanding Satisfaction, nor force the other to wait the Event of a Suit he will not take a Step in.

Clerks of the Office both of them, and therefore the Plaintiff would compel the Defendant to plead in the ſame Term the Writ was returnable. So are the Precedents.

Aſſiſ. 40. *pl.* 23. *Querel' minime proſequat fuit, ſed eam proſequi penitus ceſſavit et reliquit.*

Bro. Red. 61. *Ad prox' curia' præd' J. quer' præd' ulterius proſequi noluit, ſed actionem ill' penitus reliquit.*

Reb. 90, 91. *Ad quem diem* (the Day of Return) the now Defendant *breve illud ult' proſequi noluit, ſed ac'con' ill' penitus reliquit.*

Some

Some late Collections of the Sweepings of Attorneys Closets, good and bad without Distinction, nay some of them omit it, but these are no Rules to go by.

And the requiring this brings no Inconvenience on a Person oppressed, but only puts every Thing in its proper Place and Order.

If a Suit is brought against a Man maliciously, to hold him to Bail, and detain him in Prison, and the Plaintiff will not proceed, an Action of Reparation will be immediately; the first Plaintiff confesses in Effect the Business of the Suit to be over, and that he hath no further Expectations from it.

If he declares, that presumption is at an End, but then the Defendant may plead and force him on to Judgment, unless the Plaintiff determines it by Nonsuit or Discontinuance, and then the Defendant is ripe for his Action.

But to suffer an Action for the Falsity and Malice of the Suit, while the Party is regularly carrying it on, is a very wrong Anticipation of the Trial, and hazards plainly the bringing on a great Absurdity, that *A.* shall justly and duly prosecute an Action against *B.* and recover 100 *l.* against him, and yet *B.* being too quick for him, recovered Damages for the Falsity of the Action.

Objection: They may happen upon a *Non-pros* or Nonsuit or Judgment, not upon the

Merits, and much more where the Plaintiff happened not to declare immediately. *Resp.* 1. As to the Nonsuit.

While the Prosecution goes on, it stands indifferent whether true or false, and the Effect of contrary Verdicts is manifest, but where the Cause is over, and there can be no Trial, the bare Possibility of a new Suit shall not oust the other of his Action; after Nonsuit in Appeal there might be a Conviction of Felony upon an Indictment.

But if no Indictment were found, Conspiracy lay the mean Time, and there is a Writ in the *Reg.* 135. upon *acquietat' recessit* framed for that Case, as there appears, *Mich.* 17 *E.* 2. 509.

In Conspiracy on Nonsuit before Declaration on Appeal, where there was no Acquittal because nothing to arraign the now Plaintiff upon.

Exception: He may at another Time be attainted of the same Crime, and in Conspiracy cannot be (yet) said to be quit of a Thing whereof he may be attainted.

Resp. You shall not by Possibility oust us of an Action where we directly alledge, that you have made such false Claim, and then go over to another Exception.

2. As to the deserting the Suit, it amounts to a Yielding that he has no hopes from it, and the

the Court will not preſume there will ever be any more done upon it.

Smith v. *Cranſhaw*. A ſtronger Caſe.

ACTION upon the Caſe for a malicious Proſecution, where it was found that the now Plaintiff was committed upon Bail to appear at the next Aſſizes, and there he was (not tried and acquitted) but delivered by Proclamation. Sir *W. Jones* 93.

Here the Proſecution was deſerted and given up, and the Action held well to lie, tho' there was an Indictment in Being, and no Acquittal.

There is much ſtronger Reaſon to maintain an Action for a malicious holding to Bail, if the Plaintiff deſert his Cauſe, and decline proceeding, though he be not actually non-proſſed.

But here only the Commencement of a Suit is ſhewn, and no End of it, nor any Default aſſigned in the Plaintiff in carrying it on, the Defendant in that Suit is too early to complain of its being falſe and malicious.

Judgment muſt be for the now Defendant.

Caſe of the Pariſh Clerk of St. Giles Cripplegate.

Rule *Niſi* for a Prohibition to a Suit in the Eccleſiaſtical Court for a Rate for Pariſh Clerk. Forteſc. 239. Salk. 536. Fol. 168.

AN Aſſeſſment of 4*s. per Ann.* was laid upon every Houſe, to be paid to the Clerk who libelled for it in the Spiritual Court.

Sir *Peter King* moved for a Prohibition, and a Rule was made to ſhew Cauſe; but *Parker* Chief Juſtice *ſemble*, That a Prohibition ought not to go, for this Rate is for the more decent Performance of divine Service, and within the ſame Reaſon as that for waſhing the Surplice, and he could hardly maintain an Action for it. But it ought to be collected by the Churchwardens, and not by the Clerk himſelf; *iſſint ſemble par tout la Court.*

Goodright v. *Wright.*

Deviſe to *S. W.* and her Iſſue, with Remainder over, *S. W.* dies in the Life of the Teſtator. *Quære* whether the Iſſue can take by Purchaſe. 10 Mod. 369. Will. Rep. 397.

EJECTMENT, the Jury found a ſpecial Verdict, that *John Wood* being ſeiſed in Fee deviſed the Lands in theſe Words, *viz.* "All the reſt of my Goods and Chattels "moveable and immoveable, not before "given, I give and bequeath unto my Ne"phew *Edward Baſil*, Rector of *Dowderham*, "and him I appoint my whole Executor, and "Heir of all my Lands and Tenements of "*Carbius Place* and *Smallacombe*, with the "Appur-

" Appurtenances, as followeth; Firſt I give my " Lands in *Carbius Place* and Eſtate therein, and " my Land of *Smallacombe* or Eſtate in that, " unto my Couſin *Edward Baſil*, *Suſannah* " *Wright*, and Mrs. *Margaret Baſil*, and their " Iſſue lawfully to be begotten, and for want " of Iſſue in them, to the Heirs of *Edward* " *Baſil* for ever." They find that —— *Baſil* and *Margaret Baſil* died without Iſſue *poſtea et in vitâ Teſtatoris*. That *Suſan Wright* died alſo in the Teſtator's Life-time, leaving Iſſue the Defendant *Margaret Wright*, who was born after the Will made, and before the Teſtator's death, that ſhe died afterwards without Iſſue, that the Defendant *M. W.* is Heir at Law to *Edward Baſil*, that upon the Teſtator's Death he entered and was ſeiſed *prout*, *&c.* that *Richard Wood*, the Leſſor of the Plaintiff, is Brother and Heir to the Teſtator, and entered upon the Defendant's Poſſeſſion, and being ſeiſed *prout*, *&c.* made a Leaſe to the Plaintiff who was poſſeſſed till the Defendant entered upon him, *&c.* *Sed utrum ſuper totam materiam*, *&c.*

Serjeant *Pengelly* for the Plaintiff, That upon the Words of the Will here is a Limitation in Tail to *E. B.* Remainder in Tail to *S. W.* Remainder in Fee to the Heirs of *E. B.* that the Defendant is Iſſue of *S. W.* and Heir general of *E. B.* and *S. W.* dying after the Will and in the Life-time of the Teſtator, the Queſtion would be whether the Defendant could take by either of the Titles.

He insisted that a Will must be considered under the Statute of *H.* 8. as a Conveyance, and that there must be a Donee *in esse* at the Time the Limitation is to take Effect, otherwise it would be void.

When the first Devisee dies, the Issue or Heir (as the Limitation is) cannot take, because there are no Words to give them an immediate Interest, but only in Consequence of the Ancestor's Estate; if the Ancestor had ever taken, it would have been in his Power to dispose of it, and thereby prevent any Thing coming down to the Heir; but if he did not, then the Heirs would have it by Descent.

That is no more than a Devise to a Man and the Heirs of his Body begotten, which only derives the Estate over to them as included in him.

That this is an intire Limitation, and the Word *Issue* or *Heirs* cannot be separated from the first Taker, if he had ever taken they would not have been separated, because that would have lessened his Estate, and made him only Tenant for Life, and the Words must have the same Construction still.

Issue a Word of Limitation in a Will.

He cited Cases to prove that these are Words of Limitation only, and the Issue or Heirs could not take but through the Ancestor, *Plowd.* 244, 245. *Brett* and *Rigden's* Case, *Rep.* 105. *Shelly's* Case 155. Record of *Chedde's* Case. *Cro. Car.* 258. *Carter* 2, 4, 5, 6. *Cro.*

Cro. Eliz. 343. *Palmer* 556. *Vent.* 341. 2 *Lev.* 243, 244. That a Limitation to a Man and his Heirs generally as to the Intireneſs of the Limitation.

Sir *Peter King contra*: That *Edward Baſil*, Rector of *Dowderham*, and *E. B.* afterwards named, are different Perſons for any Thing found by the Verdict, and if ſo, there is an Eſtate in Fee ſtanding out in *E. B.* Rector of *P.* againſt the Plaintiff's Title.

That the Defendant *M. W.* was living at the Time of making the Will, and by force of the Word *Iſſue*, which is the ſame as *Children*, ſhall take by Purchaſe as Jointenant with *Margaret* and *Suſan*, for they could not take a Joint Eſtate Tail.

That the Court will make this Conſtruction rather than that the Will ſhould have no Effect. *Vent.* 258.

But in Caſe the Defendant could not take as Iſſue of *S. W.* yet ſhe might take as Heir general, 10 *E.* 13. and that in this Caſe the Heirs of *E. B.* are not Words of Limitation, but Purchaſe. Regularly where the Anceſtor takes an Eſtate, and an Eſtate is given by the ſame Conveyance to the Heirs, they are Words of Limitation, but where an Eſtate is given to the Anceſtor, and other Eſtates intervene, and then it is given to the Heir of that Anceſtor, if thoſe Eſtates do not determine in the Life of the Anceſtor, the Heirs may take by Purchaſe. 2 *Roll. Abr.* 418.

Since the general Rule of Law cannot take Place here, ſuch Conſtruction is to be made as may ſupport the Intent. *Carter* 4.

Pangelly (Replication): That of 2 *Ed. Baſils* not to be preſumed, the firſt Part of the Deviſe is only a general Direction, which is more particularly explained and declared afterwards.

Sir *Peter*'s Argument would overthrow the Caſe of *Brett* and *Rigden*, and all the other Caſes, which notwithſtanding he admits.

Limitation in a Will not different from Deed where proper legal Words are uſed. 2 Saund. 388.

Here are proper Words of a Limitation in Tail at Common Law uſed, and that was the Teſtator's Intent, therefore they ſhall be ſo taken in a Will; it is not to Heir for Life, and then to iſſue, but an entire Limitation, which is the ſtrongeſt Caſe poſſible. 9 *Co.* 127. *King* and *Malling*, 2 *Lev.* 2. *Roll. Abr.* 539. *pl.* 4. *Suſan Wright* and *Margaret Baſil*, would have taken a joint Eſtate for Life, with ſeveral Inheritances.

The Caſe in 2 *Roll. Abr.* 418. was an expreſs Contingency, but you cannot make a contingent Remainder by any Thing ſubſequent which was not contingent at firſt, and here was no Contingency in this Caſe.

Parker Chief Juſtice: The Conſtruction Sir *Peter King* ſeems to contend for is this, that the Intention of the Teſtator was to give the Lands to *S. W.* for Life, and after his Death, then to his Iſſue, but when the Eſtate never

never veſts in the Anceſtor, then by Operation of Law thoſe two Eſtates never veſt in the Anceſtor, that Operation of Law cannot take Place, and therefore the Intention ſhall be preſerved, and the Iſſue taken as Purchaſers.

Ulterius conſilium prox' Termino.

Jones v. *Givin.*

IN *Pl'ito tranſgr' ſuper caſum, &c. In Ter' Trin.* 11 *Annæ, B. R. Rot.* 326.

10 Mod. 148, 214. Salk. 15.

Parker Chief Juſtice delivered the Opinion of the Court.

The Plaintiff declares that whereas he is, and hitherto all his Life has been a good Man, who obſerved and kept the Laws, and living honeſtly gained the Love of all his Neighbours *legitimè exercendo* the Faculty of a Badger of Corn and Grain, the Defendant *præmiſſor' non ignarus, ſed machinans et malicioſè intendens* to deprive him of his happy Eſtate, to bring him into Trouble, and cauſe him to ſpend great Sums of Money, at the General Quarter-Seſſions held at *Monmouth* for the Town of *M.* 15 *October*, 10 *Annæ, falſè et malicioſè indictari procuravit et cauſavit de eo quod ipſe* 1 *Auguſti* 10 *Annæ*, and divers other Times, *&c. exercuiſſet et occupaviſſet facultat' emptor' et venditor' frumenti et grani, Anglice* the Faculty of a Badger of Corn and Grain, the

Action upon the Caſe for maliciouſly procuring *H.* to be indicted lies as well for Damage by Expence, as by Scandal or Impriſonment, though the Indictment be inſufficient. *Savill* and *Roberts.* Salk. 15.

the ſame *John* at any Quarter-Seſſions of the Peace before the Juſtices of the Peace of the County of *Monmouth* aforeſaid, *ad facultat' ill' non admiſſ' vel aſſignat'* (that is not licenſed) *contra pacem et contra formam Statuti*, which Indictment the *Queen* for certain Cauſes cauſed to come before herſelf to be determined, *&c.* where the now Plaintiff pleaded Not guilty, and the Iſſue was thereupon joined, *Et taliter ſuperinde proceſſ' fuit quod ad 15 Paſ. hoc Termino præfat'* the Plaintiff *per Cur' hic de præmiſſis acquietat' fuit, quorum præmiſſor' pretextu* the Plaintiff *non ſolum in bono et felici ſtatu ſuo præd' magnopere læſus et deterioratus exiſtit, verum etiam magnas denariorum ſummas et labor' in defenſione et exoneratione ſui ipſius in hac parte expendere et erogare coactus et compulſus fuit*, to his Damage of 100 *l.*

The Defendant demurs, and has inſiſted on ſeveral Exceptions to the Declaration, and upon one Point of Law.

The Exceptions to the Declarations are four.

1. Exception is what he has aſſigned as one Cauſe of Demurrer, that it is not alledged that the Indictment was procured by the Defendant to be exhibited *ſine aliqua rationabili cauſa.*

2. Exception, it is not averred that the Plaintiff was licenſed, which is likewiſe ſhewn for Cauſe of Demurrer.

3. Excep-

3. Exception, it appears not that he has been acquitted of the Fact by Verdict, but the Indictment might be quashed, and he should have said not only that he was *acquietatus*, but that he was *legitimo modo acquietatus*, or *secundum legis curſum*, which imports an Acquittal by Verdict, as appears *F. N. B.* 114. *G.*

4. Exception, That as this Declaration is, here appears probable Cauſe, for he has alledged that he uſed the Faculty of a Badger, which is all the affirmative Part of the Indictment, and he having Licence muſt be ſhewn on the Defendant's Part.

The Point of Law inſiſted on is,

That this Indictment is inſufficient, and no Judgment could be given upon it againſt the now Plaintiff, and therefore the Action grounded upon it is not maintainable. Of the ſeveral Points, the Matter of Law and this firſt Exception to the Declaration deſerve the moſt Conſideration, but however I will take them in the Order they are ſtated,

As to the Declaration *ad primam*, I do agree, it is a Circumſtance neceſſary to the maintaining of this Action, that the Indictment was preferred without Cauſe.

For if there were what is uſually called a probable Cauſe, nay if there be a fair and reaſonable Account given how a Complaint came to be made to a Magiſtrate, which produced

duced an Indictment, though it fall ſhort of Probability of Guilt in the Party accuſed, this Action will not lie. *M.* 5 *Jac. B. R. Cox* v. *Wirral*, *Cro. Jac.* 193. *pl.* 19. *Yelv.* 105. *Roll. Abr.* 113. (Q) *pl.* 2. Action for maliciouſly preferring againſt the now Plaintiff an Indictment for the Rape of one *A.* an Infant, whereupon he was arraigned and acquitted, the Defendant pleads that *A.* was his Daughter of the Age of eight Years, and came to him with Tears, complained that the Plaintiff had raviſhed her; that thereupon he immediately complained to a Juſtice of the Peace and carried her with him, that the Juſtice ſent for the Plaintiff, and upon Examination of the Cauſe bound the Plaintiff to appear at the next Aſſizes, and the Defendant to proſecute him; whereupon the Defendant went to the Aſſizes, and to ſave his Recognizance preferred an Indictment of Rape againſt the Plaintiff, which was found, that he carried his Daughter to the Aſſizes to give Evidence *prout ei benè licuit.*

In this Caſe though there was no Averment that any Rape was committed, and it muſt be underſtood as *Rolle* in expreſs Terms puts it, that none was committed.

Though it would not be juſt Cauſe to arreſt a Man for Felony without an Averment that a Felony was committed.

Though, as Mr. Juſtice *Crook*'s Opinion was, the Father ſeemed too credulous to cauſe a Bill of Indictment to be preferred upon the Com-

Complaint of ſo ſmall a Girl. Yet the Juſtification was held good.

For the Defendant ſhews how by Degrees lawful and juſtifiable he came to exhibit the Indictment.

1. That it was a Complaint of his Daughter, whom Nature forces him to Pity, and Tenderneſs of Age frees from Suſpicion of Malice.

2. He hereupon bruits it not abroad, but applies in a Courſe of Juſtice, and a Father could do no leſs.

3. He then prefers an Indictment for Safety of his Recognizance.

4. The Crime complained of is what is uſually committed in Secret, and on Complaint of his Daughter, though it be but Conjecture, he might well exhibit Complaint to a Juſtice; ſo that I hold this Action is not maintainable, but where there is no Probability of Guilt, nor reaſonable Cauſe, nor honeſt Occaſion of Complaint, but yet, though this muſt be the Caſe to maintain the Action, it is not neceſſary to be expreſly alledged in the Declaration, nor need the Plaintiff uſe the Words *ſine probabili cauſa* or *ſine rationabili cauſa*.

1. There are no Authorities cited that theſe Words are neceſſary.

2. Multi-

2. Multitude of Precedents are without it, I believe far the greateſt Number, unleſs it be thought that the common Preamble of the Plaintiff's good Behaviour and Innocence, and then going on with *præmiſſor' non ignar'* import it.

1. That it is not neceſſary to be proved, and neither to be alledged.

2. It is here.

But Thirdly, The true and full Anſwer is that which was given at the Bar, that the Word *malicioſè* imports all that and more, and is the proper and legal Term to expreſs it by.

I cannot ſay but at firſt Sight this may appear to be attended with ſome Difficulty.

Malice, as is commonly ſaid, is a good Proſecutor, and where there is juſt Ground of Proſecution, Malice againſt the Perſon is often the true Cauſe of laying hold of it, and yet is not made the Ground of an Action.

To this I ſay, that this is not the Meaning of the Word *malicioſè* in its proper or legal Senſe, which the Words *Malice*, *malicious*, or *maliciouſly*, bear in Common Speech. Malice in common Acceptation is a Deſire of Revenge, or a ſettled Anger againſt a particular Perſon, and in like Manner the Words *malicious* and *maliciouſly* are applied; this is by the vulgar Uſe of the Words in *Engliſh*.

But

But is not the legal Senſe, taking them as Law Terms, nor the proper Senſe as they are *Latin* Words.

Malitia is the Abſtract of Malice, there it imports directly Wickedneſs, and is the Circumſtance of an ill Action, which cuts off all Excuſes.

A Man may do an ill Thing ignorantly, which may be an Excuſe or raſhly, which is an Alleviation, or wickedly, which is not excuſeable. *Malitia*, according to its Etymology ſpeaks the laſt; amongſt the *Romans* it imported a Mixture of Fraud and of that which is oppoſite to Simplicity and Honeſty, and ſo it does in the Civil Law.

Cicero has a Diſtinction of it in his third Book, *De Nat. Deorum*, No 30. Of the Diviſions in the Edition of *Grietor*, which are preſerved in ſome other Editions, where he ſays *ſi rationem hominibus dii dederunt, malitia' dederunt, eſt enim malitia verſuta et fallax nocendi ratio.*

But without multiplying Paſſages I will juſt mention thoſe, where the Word is ſo uſed as it is impoſſible to ſuit with that Senſe, which the *Engliſh* Word *Malice* now as with us in Common Parlance.

1. The firſt is *Cicero de officiis*, *Lib.* 3. No 18.

He

He ſpeaks of ſome who had unduly obtained a Will in *Greece*, wherein (to ſucceed the better) they had named ſome of the moſt powerful Men at *Rome* Heirs, with whom they believed it to be Fraud, yet not having been privy to it, though they might take Advantage of the Hardſhip thus given, he expreſſing the Diſlike of this has theſe Words.

Mihi quidem etiam vere hæreditates non honeſtæ videntur, ſi ſint maliciis, blanditiis, officiorum non veritate ſed ſimulatione quæſitæ.

2. The Second in the Civil Law, there it has much the ſame Import as *Dolus malus. Dig' Lib'* 2. *Tit.* 13. *Lex* 8. *ubi exigitur argentarius rationes edere* ——— *cum dolo malo non exh'et*, and then it explains where and what not giving an Account ſhall be ſaid *Dolo malo non edit, et qui malicioſè edit, et qui in toto non edit*, that is that Caſhier is guilty of *Dolus malus* in not giving his Accounts, both who gives them maliciouſly, and conceals Part.

3. The third Thing is one of our own Acts of Parliament, and that is *Stat.* 25 *H.* 8. *c.* 3. for taking away Clergy in certain Caſes, and runs thus: Every Perſon that is and ſhall be hereafter indicted of Petit Treaſon, *&c.* and thereupon arraigned and ſtand mute of Malice or froward Mind, or Challenge peremptory above twenty, *&c.* ſhall loſe the Benefit of his Clergy.

Where

Where it is not poſſible to underſtand *Malice* in any Senſe, that has the leaſt Relation to the vulgar Notion of Malice, for here is no Anger or Deſire of Revenge againſt another, but an Evidence to prevent his own Condemnation; but it being in Defiance of the publick Juſtice, it is ſaid to be of Malice, or, as that ſeems to be explained by the next Word, of the froward Mind, and plainly ſtands in Oppoſition to ſuch Caſe where ſome juſt Cauſe can be aſſigned, as that it proceeded from Madneſs, Diſtemper, or other Diſabilities, which in our Books are called the Acts of God, otherwiſe, it is Wickedneſs and Frowardneſs of Mind, refuſing to ſubmit to the Court of Juſtice, which is called *Malice*.

In ſhort *Malice* and *maliciouſly* I take to be Terms of Law which in the legal Senſe always exclude a juſt Cauſe.

So in Caſe of Murder, the Statutes take away Clergy in caſe of wilful Murder of Malice prepenſe, where *wilful* ſtands in Oppoſition to *accidental*, and of Malice to Caſes of reaſonable Provocation, ſuch as might move an honeſt and good Man; and the Court, and not the Jury, have ever determined of Malice. And the Queſtion has always been with or without Cauſe or Excuſe, and therefore that which is only Malice implied by the Law, perhaps would be expreſſed more intelligibly, at leaſt more familiarly, if it were called *Malice* in a legal Senſe.

So that *Weſtminſter* 2. *c.* 12. which provides Remedy upon Acquittals in malicious Appeals, which begins *Quia multi per malitiam volentes alios gravare procurant falſa appella fieri de homicidiis*, My Lord *Coke* in his Comment, 2 *Inſt.* 384. on the Words *per malitiam* ſays, if one be appealed of Murder, and it be found by Verdict that he killed him *ſe defendendo*, this ſhall not be ſaid to be *per malitiam*, becauſe he had a juſt Cauſe.

Therefore, when it is here alledged to be *falſe and malicious*, to add after it *ſine probabili cauſâ* would be but Tautology.

And therefore in Conſpiracy for falſly and maliciouſly indicting a Man, it is never laid to be *ſine rationabili* or *probabili cauſâ*, and yet a reaſonable Cauſe is as much an Excuſe there, as in an Action upon the Caſe. 22 *Aſſ.* 77.

And *Stamford*, who is agreed to be a very judicious Author, in his *Pleas of the Crown* 172. ſays, he who is charged in Conſpiracy muſt be charged, that he did falſely and maliciouſly without good or rightful Foundation, where the laſt Words are only explanatory of what he underſtood the Word *maliciouſly* to import, for he well knew the Words *without any good or rightful Foundation* never were uſed in any Declaration for Conſpiracy, nor indeed were proper for a Declaration being Metaphorical; and theſe Obervations will ſerve to explain ſeveral Books which were objected, which uſe the like Expreſſions, ſpeaking of

Actions

Actions upon the Caſe, intending only to declare more eſpecially what is included in the Word *malicioſé*, which therefore I ſhall not take particular Notice of.

Objected, *Low* v. *Berdmore*, *Lev.* 169. *Paſ.* 17 *Car.* 2. *B. R.* in other Books *Hob.* 881. *Raym.* 135. *Sid.* 261. Declaration that the Plaintiff *falſé et malicioſé* indicted the Plaintiff of a Reſcue; ſome of the Books add *Sciens* that he was not.

1. Agreed firſt, where one is indicted for a bare Treſpaſs, Action will not lie; where the Matter of the Indictment is ſcandalous, or is to be puniſhed with corporal Puniſhment, it will.

2. That if the Count were only *falſé et malicioſé*, the Action would not lie, but if ſpecially averred *quod ſcienter fecit*, *ſciens* that it was falſe, and purpoſely to draw him into Trouble and put him to Expence, perhaps it would be maintainable.

1. *Reſp.* The Queſtion in this Caſe turns not on the probable Cauſe, but upon *Sciens* the contrary of which there is no Colour to make neceſſary to ſupport an Action.

2. They doubted whether that Aggravation *Sciens* would ſupport an Action for a falſe and malicious Indictment for a Reſcue, becauſe it was not a Matter ſcandalous.

But ſince *Savill*'s and *Robert*'s Caſe, the Expence upon an Indictment for a Reſcue is as

good a Ground for an Action on the Caſe, as the Slander upon an Indictment for a Matter ſcandalous.

Objected, Some other Caſes which relate to Actions upon the Caſe for falſe and malicious Actions.

Reſp. Perhaps my Obſervation on *Stamford* might afford an Anſwer to ſuch as have been cited.

But I chooſe to ſay there is a great Difference between the two Caſes.

1. Becauſe the Demand of Right or Satisfaction is more favoured than the Bringing to Puniſhment.

An Action is to recover his Right, or Satisfaction for it, perhaps his Subſiſtence.

An Indictment does himſelf no good, only puniſhes another, and there is a Caſe which goes ſo far as to ſay, that to indict for a Common Treſpaſs for which a Civil Action will lie, is Malice apparent.

Paſ. 30 *Car.* 2. *c. B.* 2 *Mod.* 306. Lord Chief Juſtice *North* not named.

And it is obſervable, that in Actions of Conſpiracy, in Caſes of Appeals, the Plaintiffs in Appeals never were made Defendants, but in Caſe of Judgments the Proſecutors for the moſt part were.

2. Becauſe

2. Becauſe if the Action is falſe, the Plaintiff is by Law amerced, and the Defendant to have Coſts.

And therefore my Lord Chief Juſtice *Holt*, in his excellent Argument in *Savill* and *Roberts*, *Mich.* 10 *W.* 3. where he fully ſtates the Difference between the two Caſes, ſaid that in Caſe for a malicious Action the Plaintiff muſt ſhew ſpecial matter which ſhews Malice, for elſe an Action, being the Plaintiff's ſeeking and demanding Advantage to himſelf, carrys in it, 1. A fair and honeſt Cauſe, unleſs the Recovery be utterly hopeleſs, and the Suit without ſome other Deſign, which therefore muſt be ſpecially ſhewn.

Ad ſecundam Exceptionem.

1. It is not neceſſary nor proper.

The Fact has been tried, and the Plaintiff found Not guilty by Verdict, which diſtinguiſhes this from all the Caſes cited.

He has ſaid that he did *l'ultimo modo* uſe the Faculty of a Badger, and few of the Precedents go farther.

Objection: Caſe againſt an Attorney for falſly and deceitfully entering Satisfaction upon a Judgment obtained by the Plaintiff, ſhould aver that he was not ſatisfied.

Resp. Else it is no Damage; besides satisfied or not satisfied is totally indifferent.

Ad quartam Exceptionem.

1. The true Point of this Accusation was not the bare using the Faculty of a Badger, but the using it unlicensed.

Just as if an Officer, who ought to take the Oaths and Test, neglects to do it, he is punishable not as exercising the Office, but as exercising it unqualified; and if any one should falsly prosecute an Officer for exercising an Office not having taken the Oath, would it be allowable for an Excuse, and a reasonable Cause for his Prosecution, that the Party was an Officer?

That is to say, that all the Officers in *England* without Distinction may be reasonably prosecuted for not having qualified themselves; the Case is the same of all the Badgers in *England.*

2. He does not only say that he used the Faculty, but he used it *Pitimo modo*, which cannot be a just Cause for Prosecution.

Ad tertiam, acquietat' imports an Acquittal by Verdict.

And the Difference in *Fitz.* is not between *acquietatus fuit* and *quietus recessit*, the one importing an Acquittal which is only by Verdict,

dict, and the other a Diſmiſſion, as in the Caſe there, upon a Nonſuit in Appeal.

Where by the Way may be obſerved by the Nonſuit in Appeal, whereby the Proſecution was at an End, was as good a Ground for an Action of Conſpiracy as an Acquittal by Verdict, but of that more in its proper Place.

But if any Difference between *acquietatus* generally, *et debito modo* or *l'itimo modo acquietatus*, it will not be that the one is acquitted by Verdict, the other without Verdict; but that the latter is an Acquittal where the Juriſdiction was proper, the Judment good, and every Thing *l'itimo modo*, ſo that the Acquittal may be pleaded to a new Proſecution; the other an Acquittal by Verdict from that Charge *tell quell*, and in that Senſe I take it here, and it is, ſo taken in many Books, and that is enough as will appear preſently.

As to the Point in Law.

The Indictment of the now Plaintiff being plainly inſufficient, ſo that no Judgment could be given againſt him upon it, the Queſtion is, whether this Action for maliciouſly preferring it be now maintainable?

The Strength of the Objection, that the Action doth not lie, is contained in theſe ſix Propoſitions, where an Indictment is inſufficient.

1. The Acquittal thereupon is not ſuch a legal and perfect Acquittal of the Crime charged, as will intitle the Party to plead *auterfoits acquit*, in Caſe he be afterwards regularly proſecuted for the ſame Crime.

2. That Conſpiracy lay not for a malicious Indictment, unleſs there were ſuch an Acquittal as the Party might plead *auterfoits acquit*.

3. That Conſpiracy lies not for a malicious Indictment, if the Judgment were nought. The firſt of theſe is certainly Right, the other two I ſhall not now controvert, but the Queſtion will turn upon the other three.

4. By Parity of Reaſon there muſt be a ſufficient Indictment, and a compleat Acquittal of the Crime, which the Party may plead to maintain an Action upon the Caſe for a falſe and malicious Indictment.

So is *Hunt* and *Luce* expreſly, which I ſhall afterwards tell at large.

5. That at leaſt this holds where a Matter is not ſlanderous, and the Diſtinction between Indictmens for Matters ſlanderous, and Indictments for Treſpaſs or other Offences not ſlanderous, was contained in the Reſolution given in *Savill* and *Roberts*.

6. That in this Caſe the Party could not be hurt, he was never in Danger upon this Indict-

Indictment, becauſe Judgment could not have been given againſt him tho' he had been found Guilty, and therefore he ſhall not maintain this Action.

In order to remove theſe Difficulties I ſhall ſhew,

1. That the Sufficiency or Inſufficiency of the Indictment is not at all material for the Support of this Action.

2. That the Arguments by Parity of Reaſon, from the Caſe of an Action of Conſpiracy, conclude nothing here, nor need there be an Acquittal of the Crime, though there ought to be an End of the Proſecution.

3. That there is no Reaſon for a Diſtinction upon the Matter of the Judgment, where it is ſcandalous and where not.

4. That the Party's not being in Danger of a Judgment againſt him is not material.

1. That the Sufficiency or Inſufficiency of the Judgment is not at all material for the Support of the Action.

The true Grounds of theſe Sort of Actions are on the Plaintiff's Side, his Innocence and the Damages ſuſtained by him through a falſe Accuſation; on the Defendant's Side, that this was not an honeſt Proſecution of Juſtice, and a bare Miſtake; but it was done in downright

right Malice, *i. e.* merely wickedly and without any Cauſe. The Damage that a Man may ſuſtain by a falſe Accuſation is of three Sorts.

1. In his Perſon.	Impriſonment.
2. In his Fame.	Scandal.
3. In his Property.	Expence.

And any one of theſe three Sorts of Damage, without any one of the other, is ſufficient to intitle the Plaintiff to his Action. This was ſolemnly reſolved in *M.* 10 *W.* 3. *B. R. Savill* v. *Roberts*, it was an Action upon the Caſe brought in *C. B.* for a malicious Indictment for a Riot, and Judgment given there for the Plaintiff *Roberts*; whereupon *Savill* the Defendant in the original Caſe brought a Writ of Error, and the Caſe turned ſingly upon this, whether in caſe there was no Impriſonment, and the Matter was not ſcandalous, the Plaintiff could yet maintain the Action for the Expence he was put to in his Defence; there was a Point wherein there had been great Variety of Opinions, and ſome expreſs Reſolutions, that it could not maintain the Action, but it was adjudged both in *C. B.* and *B. R.* that the Action lay; and in this Court it was expreſly reſolved that the Giſt of this Action was Damage. The three Species of Damages were diſtinguiſhed in the Manner I have here mentioned; and reſolved that the Plaintiff was as well intitled to recover Satisfaction for the leaſt Sort of Damage in his Property by the Expence, as for either of the other two. And my Lord Chief Juſtice *Holt*, who

who delivered the Opinion of the Court, founded it upon ſuch clear and ſolid Reaſons, that I believe it can never more be drawn in Queſtion; the Conſequence ſeems plain, that if Expence be one Species of Damage which the Law gives the Action to recover Satisfaction for, and there be Expence on the one Side, and Malice on the other, other Circumſtances may increaſe or leſſen the Damages, but cannot bar the Action. Indeed in anſwering the Judgment in *Chamberlin* and *Peſcott* in the Exchequer Chamber, for the Reverſal of a Judgment in the Court (the Reaſon whereof appears in *Raym.* 135. *in margine* to be directly contrary to the Reſolution in *Savill* and *Roberts*) yet Lord Chief Juſtice *Holt* ſeemed unwilling directly to deny the Authority of that Caſe, though the Judgment in the Exchequer Chamber was contrary to the Judgment in this Court, and of ſomewhat leſs Authority, and though after it was given it was thought a hard Caſe, as appears by Mr. Juſtice *Twiſden*, *Raym.* 135. and though he had other Authorities to oppoſe it, yet he choſe to diſtinguiſh it by aſſigning another Reaſon which might be given for the Judgment, he likewiſe owned that Lord Chief Juſtice *Bridgman*'s Opinion was againſt him in the main Point, and therefore obſerved that the Matter did not appear to be indictable, and ſo ſeemed to admit that in that Caſe the Action would not lie, tho' in a former Part of his Argument he expreſly held that the Action would lie where there was Scandal, though the Indictment was nought, or *Ignoramus* returned.

I am

I am apt to think that his Deſire to ſhew all the Regard he could to ſo conſiderable an Authority made him glad to take an Exception which he found to have been allowed, whereby to diſtinguiſh it; yet as it was not any Part in Caſe of *Savill* and *Roberts*, it is poſſible he had not particularly and diſtinctly conſidered it, but took it as he found it; tho' it was at that Time taken Notice of at the Bar, and conſidered as being hardly reconcileable to the Grounds he went upon in that Cauſe; for if Damage were the Giſt of the Action, and Expence a Species of Damage, as proper to maintain the Action as Scandal, why ſhould not the Action lie for a malicious Indictment though inſufficient, if it occaſioned Expence, as well as if it had only occaſioned Scandal? The Caſes differ in nothing but the Species of the Damage which he ſuſtains, which in the one Caſe is in his Fame; and in the other in his Property; and the whole Queſtion of that Caſe was whether there were any Difference between the one Species and the other, as to ſupporting the Action.

I own, the Deference I have to the Judgment of that very great Man, and the Reflection that many of the Caſes of inſufficient Indictments are of matter ſcandalous, had made me think it in a Manner for granted, but where the Matter was not capital nor ſcandalous, and the Action would not lie, if the Indictment were inſufficient.

But now that the Cauſe here turns upon it, I am of Opinion upon great Conſideration of the

the Caſe, that, upon the Grounds of this Sort of Action already laid down, there is no Ground to make a Diſtinction between a good Indictment and a bad one, whether we conſider the Matter with Relation to the Plaintiff or Defendant.

That which intitles the Plaintiff to his Action in caſe the Indictment be good, is the Damage ſuſtained by him, which he is to recover Satisfaction for.

Is not the Impriſonment, the Scandal, Vexation and Expence, as grievous, as oppreſſive and as fit to have Reparation made for it, when it is occaſioned by a Groundleſs bad Indictment, as well as by a Groundleſs good one?

But the two Species of Damage by Impriſonment and Scandal ſeem to be given up; let us ſeparately conſider the third Species, that of Expence.

There is no Difference as to the Plaintiff between the Expence upon a good Indictment and upon a bad one.

1. If he goes on to Trial, and is acquitted by Verdict, his Expence is exactly the ſame as if it had been good, and he as juſtly intitled to demand Satisfaction of him who unjuſtly, maliciouſly and wickedly occaſioned it.

Indeed it limited in *Savill* and *Roberts* upon the Occaſion I have mentioned, that if the

the Party were actually put to charge in trying it, he did not need, for the Judgment being nought he could not be hurt by it, and if that be really ſo, it may go a great way in this Matter.

But how muſt he avoid it?

Not by ſtaying at Home and ſlighting it, for if he does not take care to appear, he will be arreſted upon a *Capias*, and if he does appear, he enters into Recognizance to traverſe and try it. I know not but of two Expedients; either to quaſh it, or demur to it.

2. If he apply to quaſh.

1. This is *ex gratia*.

Not to be relied on as a ſure Agreement that he need not try it, for the Court may refuſe to quaſh it, and then I may be forced to try it.

1. In many Caſes. { Riots, / Great Contempts, / Highway *et al'*, } { Great Violence and Enormity. / Affronting Magiſtrates. / Of great Concern to Publick. }

The Court will not quaſh.

2. Before he can quaſh, of Neceſſity muſt Appear.
Take Copy of the Indictment,
Adviſe with Counſel,
Move the Court,
} which is an Expence,

3. If he demur, he muſt
{ Appear,
Take Copy,
Advice,
Argue by Counſel, unleſs very plain.

2. Will

2. Will probably, if difficult, remove it by *Certiorari*.

Hard to oblige a man to confeſs it by Demurrer, and truſt to a Point of Law when the Matter of fact is with him, contrary to Lord *Coke's* Advice.

So that of theſe two Expedients to avoid the Expence of a Trial, the firſt is not always in a man's Choice.

But both neceſſary to require ſome Expence, ſo that tho' a man be not at the Expence of a trial, yet ſome Expence, that is, ſome Damage is neceſſary.

1. The Difference of a *Quantum* is merely accidental; the Fault may be,

Very { Plain, Doubtful.

And tho' in a plain Caſe the Charge of a Demurrer be leſs than that of a Trial,

Yet in a difficult Caſe the Expence of Arguing a Demurrer, of bringing a *Certiorari* and arguing a Demurrer, may be more than the Expence of a Trial.

2. The *Quantum* of the Damages is not to the Point; he that hath Damages wrongfully, be it great or ſmall, is intitled to Reparation.

In

In *Carlion* and *Mills*, 1 *Cro.* 291. *Jo.* 312. An Action of the Caſe was brought for a malicious Citation into the Eccleſiaſtical Court, for Fame of Incontinency, and tho' the Party was diſcharged upon his own Anſwer, yet the Action was maintainable.

But this cannot be more clearly ſtated, than it is in an old Book which directly comes up likewiſe to another Point of this Caſe, as to the Danger; and therefore I ſhall cite it at large.

Paſ. 3 *Ed.* 3. 19. *pl.* 34.

Conſpiracy by one who was indicted for a common Treſpaſs and acquitted; it was objected that the Writ of Conſpiracy is given only in Caſe where the party is indicted of Felony, whereof if he was attainted, he ſhould loſe Life and Member. Judgment of the Writ, *Scroop*; the Party is equally damaged by Impriſonment in caſe of an Indictment of Treſpaſs, as of Felony, only he is not in ſo great Danger in the one Caſe as in the other, but we are not of Opinion to abate the Writ becauſe the Miſchief is leſs, for the Law wills that in every Caſe where a Man is Damaged he have Remedy without Regard to the Quantity of the Damage.

2. As to the Defendant.

That which expoſes him to this Action is Malice and Wickedneſs.

1. The

4. The Malice is not a Jot the leſs, nor the more excuſable, becauſe the Indictment is bad, that the Matter wherein he has ſhewn his Malice was not indictable, (but rather an Aggravation) as was argued in Point of Juriſdiction in *Damon* v. *Ruddorke* and *Sherman*. *Rol. Abr.* 112, 119.

Caſe for malicious preſenting him in the Eccleſiaſtical Court for Adultery, it is not neceſſary to aver that this Man was within the Juriſdiction of the Eccleſiaſtical Judge, for if he was not, the Vexation was the greater.

1. The Difficulty, which ſtood moſt in the way of theſe actions, was the fear of diſcouraging Proſecutions, and the Regard to what was done in a legal Courſe to bring Offenders to Puniſhment.

Therefore the Struggle was ſtrong and late, where the Proſecution was by the Party ſuffering, and there was no Conſpiracy as appears.

Knight and *Jermim*, *Cro. Eliz.* 70, 134. *Leon.* 107. *Throgmorton's Caſe*, *Cro. Eliz.* 563.

Chamberlaine v. *Preſcote*, *Raym.* 135. *in margine*, the Reaſons of that Notion, and it has been reſolved, that requiring Satisfaction from thoſe who proceed out of meer Malice and Wickedneſs without any reaſonable Ground, will be no Diſcouragement at all to

him who honeſtly proceeds on reaſonable Grounds.

Smith v. *Cranſhaw*, *Jones* 93.

Shall then a Proſecution on a bad Indictment be more favoured than a Proſecution on a good one?

The bad Indictment equally ſerves the end of Malice, by putting the Party to Expence, but cannot ſerve the End of Publick Juſtice, by bringing even the Guilty to Puniſhment.

So that it is good for nothing but Vexation.

And ſhall that ſingle Circumſtance exempt the malicious Proſecutor from making Satisfaction, that there is upon the face of the Indictment no Poſſibility of doing good by it.

If this ſhould make a Difference, it ſhould rather be by turning it the other Way, that if the Purſuit of Juſtice and taking a legal Courſe would excuſe, yet it ſhould be only where the Indictment was ſufficient to anſwer the end of Juſtice, and if that Difference were then eſtabliſhed, all the Effect that it would have would be only to make Proſecutors more careful that their Proſecutions were right.

On

On the other Hand conſider,

2. A ſmall Slip will vitiate an Indictment. It is eaſy for one that proſecutes maliciouſly, to make one on Purpoſe to protect himſelf in his Malice.

1. Therefore Anſwer,

M. 26, 27 *Eliz. Bulwer* v. *Smith*, *Bulwer's* Caſe 7 *R.* 1. Caſe for maliciouſly proſecuting the Plaintiff to be outlawed, and arreſted upon a *Capias*; one of the Reſolutions is, that Error in the Proceſs ſhall not give any Advantage to him who ſued it.

Conſpiracy upon appeal of Robbery brought by Bill in Franchiſe, and removed, whereupon the Plaintiff was nonſuited before Declaration, and no Judgment found, and therefore the now Plaintiff was diſmiſſed without being arraigned. Exception was taken, that this Appeal not being by Writ, but by Bill, ought to ſet forth the Certainty of the Robbery, and not having done it, the Appeal is null, and there could be no Cognizance of it.

What is the Anſwer, did this excuſe the Defendant? No.

Scroop: It was from your Conſpiracy and Alliance, and therefore this Tort began in you.

In ſhort if this was allowed, it would chalk out a ſecure way for the Malicious to ruin the Innocent.

The Authority that has been cited to ſupport the Diſtinction upon the Inſufficiency of the Judgment, was, 9 *Ed.* 4. 12. which was in Conſpiracy.

Littleton argued, *et non negabatur*, if a man be indicted, and the Indictment is not ſufficient, *&c.* and he takes not Advantage of it, but pleads *Non culp.* and is acquitted, and brings Conſpiracy, *&c.* the Defendant may ſhew that the Indictment was not ſufficient, ſo that they were not duly arraigned, and he ſhall have Advantage thereof, *&c.*

And in many Books this is cited, and allowed to be Law, the other is an Action upon the Caſe.

M. 8 *Car. B. R. Hunt* v. *Line*, *Danv. Abr.* (P) *p.* 2. *&* 3.

Declared that the Defendant *falſé et maliciosé* procured him to be indicted for Deceit in ſelling him one———Silk Stockings, and the words (Pair of) are omitted between one and Silk; on *Non culp.* Verdict for the Plaintiff, Judgment arreſted becauſe the Indictment is not good by reaſon of the Omiſſion of the words (Pair of.)

Reſolved that in Caſe in nature of Conſpiracy for maliciouſly procuring one to be indicted

dicted and profecuted, *&c. quouſq; &c. legitimo modo acquietatus*, if the Indictment be not good, the Action does not lye, for he was not *legitimo modo acquietatus*; and this Action is all one with Conſpiracy *quoad hoc*.

So that the Parity of Reaſon between Conſpiracy and Caſe *quoad hoc*, is the ſole ground of this Reſolution.

I have cauſed very diligent Search to be made for the Record of this Caſe, becauſe there is a manifeſt Miſtake in putting it, but have not been able to find it.

And *Holt* C. J. in *Savil* and *Roberts*, in what he ſaid upon the Caſe before-mentioned of *Chamberlaine* and *Preſcot*, took Notice likewiſe that ſo it was in Conſpiracy.

So that there is no Authority but in caſe of Conſpiracy, or what is built thereupon, and if the Caſes are not the ſame *quoad hoc*, all falls to the Ground.

That I may therefore the better meet with the Strength of the Reaſoning in *Hunt* and *Line*, and declare my Opinion in this Caſe, I will in the next place ſhew,

3dly, That the Argument *a pari* from the Action of Conſpiracy to the Action upon the Caſe does not hold, that they are not the ſame *quoad hoc*.

Nor need there be any Acquittal of the Crime, tho' I think there ought to be an End of the Proſecution.

Before I enter upon this Point I would premiſe, 1. That tho' in ſtating the Strength of the Objection in this Caſe, I have, to avoid Ambiguity, mentioned two Points in Conſpiracy, which are relied upon, *&c.* that Conſpiracy lay not for a malicious Indictment if the Indictment were nought, which is the Caſe of 9 *Ed.* 4. 12. 2. That it lay not unleſs there was ſuch an Acquittal as that the Party might plead *Auterfoits acquit*, which is the Meaning of the *L'itimo modo acquietat'* in *Hunt* and *Line*, yet they are really but one and the ſame; for the only Reaſon aſſigned why Conſpiracy lay not on a bad Indictment, is becauſe there could not be a compleat Acquittal which the Party could plead in Bar of another Indictment.

So in *Vauxe's* Caſe, 4 *R.* 45. expreſly.

And therefore what goes to the Point of Acquittal goes to the whole.

3. That in all Caſes before an Action, unleſs brought for a malicious Proſecution, the Proſecution muſt be either determined or deſerted.

For otherwiſe, as is rightly ſaid *Yel.* 117. the Point would come to be tried too ſoon and diſorderly.

4. That

4. That the Determination must be such as does not admit a reasonable Cause for the Prosecution; as if a Pardon be pleaded which admits in some sort Guilt, however is quitting the Vindication of Innocence, or Justification, which admits the Fact, and consequently reasonable Cause of Complaint. Quære whether said *in Cur'*.

5. That if there be an Indictment which is bad, and upon not guilty pleaded is falsified, this is a good Determination of that Prosecution, and a good Acquittal from the Indictment *tiel quell.*

So that an Action upon the Case may be brought for the Malice, though if a better Indictment should afterwards be found, the Party cannot plead *Auterfoits acquitt* in Bar.

These Things being premised for my being understood, I proceed to consider the Argument *a pari* from Conspiracy.

1. That I think Conspiracy the least proper to be argued from any Action, because there are in it more irregular Cases, more contrary Opinions, than in any other Action whatsoever, and is the Rise of many received Opinions.

Perhaps, if these Opinions now argued from were looked into, they would appear in a very indifferent View. 2. Acquittal is not in

the Nature of the Thing neceſſary in Conſpiracy.

For in Appeal if the Plaintiff be nonſuit before Declaration, and no Indictment found, ſo that the Defendant being diſmiſſed without being arraigned, yet Conſpiracy lies. *Paſ.* 17 *Ed.* 2. 509. Objection was made that the Party may be yet attaint, and Conſpiracy ſhall not be ſaid to be of a Thing whereof he may be attaint.

Reſp. You ſhall not by Poſſibility oult us of an Action, when we certainly and directly charge that you made ſuch falſe *Alliance*, and then paſs to another Objection. *P.* 17 *Ed.* 2. *Conſp.* 26. the like.

And *Reg.* 134. there is a Writ where the Defendant in Appeal was not acquitted, but upon the Plaintiff's being nonſuit *quietus receſſit*.

But its Neceſſity ariſes merely from the Form of the Writ, becauſe there is no Form of a Writ in the *Regiſter* upon Indictments which have *quietus receſſit*, but all are *Pitimo modo acquietatus*.

And in Effect ſo is the Reaſon aſſigned in the *Poulters Caſe*, 9 *R.* 56. It is true (ſays the Book) that Conſpiracy lies not, unleſs the Party be indicted *et Pitimo modo acquietat*. for ſo are the Words of all the Writs.

Now

Now this ſhews a manifeſt Diſparity.

1. The one is a formed Action where Acquittal is neceſſary by the Form of the Writ, which muſt be ſtrictly purſued.

2. An Action upon the Caſe, which allows a Latitude, and makes nothing neceſſary but what the Reaſon of the thing makes ſo; but further,

3. There are in the Books many Diverſities expreſsly ſtated between Conſpiracy and Caſe, and this very Point of Acquittal is one of them, and found upon the Reaſons mentioned that the one is a formed Action, the other not.

M. 1 *Car. Smith* v. *Cranſhaw & al.* excellently reported in *Jo.* 93. and is alſo reported *Lutw.* 79. 1 *Cro.* 15. 2 *Bulſtr.* 271. *Rol. Abr.* 112. 17. *Intr. Trin.* 21 *Jac.* 651. and which takes Notice is a new Action brought after that between the ſame Parties. *Palm.* 315. The Action was an Action upon the Caſe for a falſe and malicious Proſecution for treaſonable Words, the Count ſets forth the Plaintiffs Innocence.

That the Defendants *præmiſſa ſatis ſcien' falſâ conſpiratione inter eos prædicta* impoſed the Crime of Treaſon upon him, cauſed him to be arreſted on an Indictment for High Treaſon for ſpeaking treaſonable Words, to be preferred at the Aſſizes, which was found, and

and the Plantiff thereupon committed and detained in prison, till bailed to appear at the next Assizes, where he appeared (and was acquitted) nothing being objected against him on the Part of the King *per Proclamation' &c. debité et secundum Leges hujus Regni Angliæ dimiss. et deliberat' fuit*; one of the Defendants pleaded a special Plea, the others *Non culp'*: After a Verdict for the Plaintiff it was moved in Arrest of Judgment, and the Exception was, that the Action would not lie, because the Parties were not acquitted, but Judgment was given for the Plantiff; and all agreed, says *Jones*, that there are two Writs or Actions for Conspiracy, 1. the formal Writ in the *Register*; 2. an Action upon the Case; that these Writs differ only in this, the first had a precise Form, but it is to be framed as the Case requires, consequently in Conspiracy.

1. The Party must be indicted and acquitted.

2. There must be a Conspiracy.

Therefore that Action lies not against one, for one alone cannot conspire.

3. It must be false and malicious.

In an Action upon the Case.

An Acquittal is not of Necessity, but an Endeavour *falsé* and *malicioſé* to indict a Man; whereby he is grieved by Imprisonment

or

or otherwiſe, though *Ignoramus* returned upon it, is ſufficient.

2. If any one do, it is a good Cauſe of Action, but it muſt be *falſé et malicioſé*; this Caſe is the more remarkable, becauſe it was upon great Conſideration; the Reaſon appears to be very accurate, bating ſome Miſtakes about the Original of the Writ of Conſpiracy.

The Point of the Acquittal was the great Point in the Caſe, and which is yet more, this was only a Deſertion of the Proſecution, which was not tried, nor otherwiſe at an End nor determined; the Difference likewiſe between Conſpiracy and Caſe, on the Point of Acquittal, is expreſsly declared in the other Books.

T. 4 *Jac. B. R. Marham* v. *Peſcod*, *Cro. Jac.* 130. *Rol.* 114. 3. *M.* 16 *Jac. B. Crankbank*'s Caſe. 2 *Rol. Rep.* 49. *T.* 18 *Jac. B. R.* 2 *Rol. Rep.* 188 agreed.

And in ſome others of theſe which I ſhall cite under the next Head.

4thly, Let us conſider that when an Indictment is preferred, there may be, and frequently are, three Caſes, wherein there can be no Acquittal which can be pleaded in Bar.

1. If the Bill be returned *Ignoramus*.

2. If

2. If it be *coram non Judice*, there not being a compleat Authority.

3. If the Indictment be insufficient.

And there are many Authorities, that none of the Defects are any Objection to the Action for the malicious Prosecution.

1. *Ignoramus.*

Pas. 31 *Eliz. B. R. Knight* v. *Jerom* cited *Palm.* 315.

Mich. 5 *Jac. ib.* v. *Lowry*, *Cro. Jac.* 190.

Trin. 16 *Jac. ib. Payn* v. *Porter. Cro. Jac.* 490.

Mich. 5 *Jac. ib. Taylor's Case. Palm.* 44, 45.

Mich. 20 *Jac. ib. Plake's Case. Palm.* 315.

Pas. 22 *Ca. ib. Stile* 10.

Pas. 21 *Car.* 2. *ib.* Sir *And. Henly*, Dr. *Burstal*, *Ray.* 180.

Vent. 23, 25. *Keb.* 486, 434.

2. Incompetent Authority.

Trin.

Trin. 1653. *B. R. Stile* 372.

Trin. 1653. *B. R. Atwood* v. *Monger*, *Stile* 378.

Stile 372. Declaration that the Defendants falſely and malicioufly cauſed the Plaintiff to be indicted for ſtealing a Mare, and that the Grand Jury found it *Ignoramus*, after Verdict for the Plaintiff one of the Exceptions was, that all the Proceedings are expreſſed to be before the Judges as Commiſſioners of Gaol Delivery, and not Commiſſioners of *Oyer* and *Terminer*, which would be void if the Party were not in Cuſtody. *Rolle:* We intended it before them as Juſtices of *Oyer* and *Terminer*; in truth it is not material before what Authority he was indicted, for the Trouble the Party is put unto by Reaſon of the Indictment is the Cauſe of this Action, and not the Trial, the Authority is not material.

Nor is it material, whether the Indictment be good or not.

Paſ. 1653. *Atwood* v. *Monger*, *Stile* 371.

Caſe for cauſing a falſe Preſentment to be made againſt him before the Conſervators of the River *Thames*, for ſuffering eight Loads of Earth to fall into the River *Thames*. After Verdict for the Plaintiff, Exception,

That it appears not what Authority the Conſervators had to take the Preſentment, and if they had none, it was *coram non judice*, and

and the Plaintiff could not be hurt by it. *Twiſden pro quer'* anſwered, that the Action was for the Vexation, and lies though they had no Authority.

Rolle: Caſe lies for Appeal in *C. B.* though *coram non judice*, for the Vexation, and here it is all one whether they had Juriſdiction or not, they took upon them to have Authority to take the Preſentment, and the Plaintiff is prejudiced by the Vexation.

This Caſe was cited as Law by Lord Chief Juſtice *Holt* in *Savill* and *Roberts*, and who obſerved it to be not for Matter ſcandalous, but for ſuffering eight Loads of Earth to fall into the River *Thames*.

Thirdly, This very Caſe is ſufficient for an Indictment.

Trin. 2 *Jac. B. R. Barnes* v. *Conſtantine*, *Cro. Jac.* 32. *Yelv.* 46.

In that Caſe incompetent Authority, and inſufficient Indictment, argued upon as the ſame.

Style 371. cited at large.

Mich. 17 *Jac. B. R. Taylor's* Caſe mentioned before, *Pal.* 44, 45.

Mich. 1694. *B. R. Gardiner* v. *Jolly*, *Stile* 157.

Paſ.

Paſ. 25 *Car.* 2. *B. R. Smithſon* v. *Simpſon* and *Alinſon*, 3 *Keb.* 141.

This ſeems a full Anſwer to the Argument drawn from the Parity of Reaſon between Conſpiracy and Caſe, and conſequently to the Authority of *Hunt* and *Line*, which ſubſiſts upon that, and it is only grounded, and fully proves that they are not the ſame *quoad hoc*.

But becauſe the Judgment in the preſent Caſe is not for a Matter ſcandalous, I proceed to ſhew,

That there is no Reaſon for a Diſtinction as to the Matter of the Indictment, where it is ſcandalous and where not, provided there appear other Damages either of Impriſonment or Expence.

Indeed it muſt be admitted that my Lord Chief Juſtice *Holt*, in the Caſe of *Savill* and *Roberts*, gave ſome Countenance to ſuch a Diſtinction, and many of the Caſes cited are ſuch where the Matter was ſcandalous.

1. If this Declaration be allowed, it gives up the Authority of the Caſe of *Hunt* and *Line*. For according to the Diſtinction, Inſufficiency of the Indictment is not a juſt Exception to the Action where the Matter is ſcandalous, and therefore the Opinion in *Hunt* and *Line* was wrong, which allowed the Exception in that Caſe where really the Matter was ſcandalous.

That

That Caſe was upon an Indictment for a Deceit in ſelling Silk Stockings, *i. e.* a Cheat.

Juſt the ſame as *Brigham* and *Brocaſs*, 3 *Keb.* 837. for deceitful ſelling of Hair, in which Caſe, Expence then not being ſettled to be enough, the Action was ſupported upon the Account of the Slander.

So that if the Caſe of Slander be given up, as by this Diſtinction it is, there remains not as much as one ſingle Caſe, where the Action is not ruled to lie upon the Inſufficiency of the Indictment.

2. The Caſes cited mention nothing of this Diverſity, nor imply it; in many of them the Slander is indeed aſſigned as a Reaſon why an Action for a malicious Indictment will lie, though there were no Acquittal; but the Argument reſts only on its being a Damage, not its being the Species of Damage, and therefore this Reaſon is not aſſigned ſingly, nor in all of them, but according to the Nature of the Caſe, the Action is held maintainable in ſome of them for the Slander, and in ſome for the Vexation, in ſome for both.

That in *Jones* 93. aſſigns it very generally, wherever the Party is grieved by Impriſonment or otherwiſe.

I think more Mention of Vexation than Slander.

And

And yet had moſt of them reſted on the Slander, little Conſequence could have been drawn thence.

1. Becauſe at that Time Slander was ſettled to be a good Cauſe of Action, when Expence was doubted.

2. Slander is always Damage apparent, Imprisonment and Vexation muſt be alledged, and in many Caſes there might really be none, or it might not be well averred.

3. In ſome of the Caſes cited there was nothing of Slander.

Atwood v. *Monger*, *Stile* 378. which I took Notice of before.

It is true that was not a Caſe of an inſufficient Indictment, but want of Juriſdiction; but ſtill it was within our preſent Queſtion, for there could be no *debito modo acquietat*'; and there was no Slander, and yet the Action lay, which is our preſent Point.

4. Slander is not the Point, the Wrong is the malicious Indictment, the Slander is only the Damage ariſing by that Wrong.

Therefore a Man ſhall never bring an Action for a Libel, and on Not guilty maintain it by Evidence of a Bill of Indictment, offered to a Grand Jury, though never ſo malicious, and ſo of any other legal Proceeding, unleſs

leſs it was *coram non judice*, and then indeed, as *Hobart* ſays in *Walterer* and *Freeman*, *Hob.* 266. it is *ſcandalum temerarium*, as if ſpoke elſewhere. *Cummis* v. *Deam C. B. Trin. 7 Reginæ Guildhall.*

Action for theſe Words "*John Cummins* "and *Chambers* did ſet on me, and bound me "and robbed me," On *Non culp.* it appeared the Defendant was robbed, and that the Words were ſpoken on a Proſecution for the Robbery, wherein *Cummins* and *Chambers* were indicted and tried, but acquitted, and the Chief Juſtice held thoſe Words ſo ſpoke maintained not this Action, but the Plaintiff ought to bring a ſpecial Action for a malicious Proſecution, (if it were malicious) whereof theſe Words were Part.

Lord *Beauchamp*'s Caſe, *Keb.* 26. Words in order to a Proſecution are juſtified by the Proſecution.

And the Rule ſeems on very juſt Ground, for an Action for Slander, and an Accuſation for a malicious Proſecution, require different Defences.

In an Action for Slander which can only be uttered, the Wrong is the Slander, and the only Juſtification is that it is true.

In an Action for a malicious Proſecution the Slander is only the Damage, and Wrong is the Malice, and therefore if the Matter were probable, nay if there were any juſt Grounds

Grounds to complain, the Defendant ſhall be acquitted on Not guilty.

5. I take every Authority, that the Action will lie where the Matter is ſcandalous, to be an Authority that it will lie on a like Proſecution, if it be expenſive, though not ſcandalous.

Becauſe, as I have ſaid before, ſince it is ſettled, that a Man is intitled to Satisfaction as well for Damages in his Property through Expence, as for Damage in his Fame through Scandal, the Species of the Damage, whether the one or the other, is the ſame, for they can make no Difference now, whatſoever it might have done formerly.

And indeed all the reaſoning before uſed upon the Direct Point of the Inſufficiency of the Indictment, will in a great Meaſure hold here, the Damage of the one Party, and the Malice of the other, is the ſame; Malice will be gratified ſufficiently by ruining the Innocent by falſe Indictments, as well where they do not attack his Reputation as where they do. In the one Caſe the Acquittal may clear his Reputation, but in neither reimburſe him.

There was only one Thing more hinted in the Objection, and that is, that upon inſufficient Indictments the Party indicted is not in Danger, and the laſt Thing therefore which I have undertaken to ſhew, is that the Party's

not being in Danger of a Judgment againſt him, is not material.

1. The Action is not brought for the Damage, but for the Expence, and if Expence be a Damage ſufficient to maintain an Action of this Kind, there is no need that there be Danger too.

2. The Danger of a Judgment in ſuch a Caſe as this is only the Danger of a Fine or Penalty, which is only the Danger of paying more Money, and what Reaſon is it that you ſhall not recover the Charges you have actually been put to, becauſe you were not in Danger of being put to more?

3. What Danger is a Perſon in when the Bill is returned *Ignoramus*, or the Indictment is *coram non judice*, and yet there an Action lies, as I have ſhewn, and in *Arundel* and *Tregono*, *Yelv.* 116. before cited, the Objection that he was not in Danger is ſtated and over-ruled in Caſe of an improper Authority.

And in *Atwood* and *Monger*, *Style* 378. Part of the Exception was, that the Party could not be hurt.

4. In Truth Danger is only Increaſe of Damage, and therefore cannot affect the Action, as is well argued *Paſ.* 3 *Ed.* 3. 19. before cited. I can think but of one Objection more that can be made, though it hath not, which is, that though an Action upon the Caſe

Caſe may lie, notwithſtanding there may be no Acquittal, and the Plaintiff need not alledge an Acquittal, as he muſt in Conſpiracy, yet if he will make that Part of his Caſe, and will lay that he was acquitted, if it comes out that he was not acquitted, or it appears he could not be acquitted, he has failed, and cannot recover.

1. *Reſp.* There is a Diverſity between Actions upon Contracts and on Torts. In Actions on Contracts the Plaintiff muſt prove it as he has laid it; but upon a Tort which is often aggravated with many Particulars, it is not neceſſary to prove his whole Caſe, but though he fails in many of the Particulars, yet if he proves ſo much of it as leaves him good Cauſe of Action, he ſhall recover.

2. The *Acquietatus* imports an Acquittal by Verdict; and though when *Auterfoits acquit* is pleaded, it imports an effectual Acquittal from the Crime, becauſe otherwiſe it is no Plea; yet in this Caſe where a perfect Acquittal is not material, and where it appears that upon this Indictment he could not be acquitted of the Crime, ſo as to plead it, if the Words (*de præmiſſis acquietatus*) ſhall be underſtood *ſecundum ſubjectam materiam* for an Acquittal by Verdict from that Indictment, which is enough.

3. If the Caſe of *Hunt* and *Line* could be mentioned upon the Ground, that when he lays that he was *legitimo modo acquietatus*, that muſt be

ſuch an Acquittal where all Things were right, this Caſe differs, not to ſay *l'itimo modo acquietatus*, but *de præmiſſis acquietatus* generally.

To conclude.

Upon this View of the Caſes cited a very ſhort Reaſoning will determine the preſent Queſtion.

The Actions for malicious Indictments where the Matter is ſcandalous, though the Indictment were naught, ſhew that a malicious Indictment though naught is *injuria*.

And *Savill* and *Roberts* proves the Expence occaſioned to be *damnum*.

And if there be both *damnum* and *injuria*; certainly an Action lies.

Therefore there muſt be Judgment for the Plaintiff.

De Termino Paſchæ Anno tertio decimo Annæ Reginæ.

Domina Regina v. *Green.*

Commitment for Game Act, for Want of Diſtreſs, till he ſhould be diſcharged by due Courſe of Law, quaſhed. 5 An. c. 14. made perpetual by 9 An. c. 25.

GREEN was brought up by *Habeas Corpus*, and upon the Return it appeared that he was convicted for Courſing not being qualified, contrary to the Game Act; that the Juſtice iſſued his Warrant for levying the Fine, whereupon there was a Return of no Diſtreſs, and then he was committed to the Houſe of Correction till he ſhould be diſcharged by due Courſe of Law.

Serjeant *Commins* took an Exception to the Warrant, that it ought to have been for three Months certain according to the Statute, and not till he ſhould be diſcharged, &c. To which it was anſwered by Serjeant *Pratt*, and Mr. *Darnel*, that though the Words of the Statute were ſo, yet this Form was more proper in the Warrant of that upon Payment of the 5*l.* and on Application to a Juſtice of Peace he might be diſcharged at any Time within the three Months, and if he did not, yet he muſt be diſcharged at the End of the three Months; this Form being made certain by Reference to the Direction of a general Law.

When a Statute directs Imprisonment for a certain Time, the Commitment must express it.

But the Court held that when an Act of Parliament says a Man shall be imprisoned for a precise Time, the Commitment must be expressly for that Time, that the Gaoler may know how long exactly to keep him, and when it is expired he is forthwith to discharge him without applying to a Justice of Peace; and for this *Eyre* Justice cited Cases.

After Commitment in Default of Distress, Justices cannot discharge on paying the Penalty.

Rex v. *Bracy*, *Mich.* 8 *W.* 3. Doctor *Greenvel*'s Case, *Pas.* 9 *W.* 3. *Hollingshead*'s Case, *Hill.* 1 *Annæ*, they held also that the Defendant could not have redeemed himself by paying the Fine after Commitment, for that the Nature of the Punishment was then altered by express Words of the Statute, and the Justices had executed their Authority, and had no Power to take the Money.

Upon this Fault in the Commitment the Defendant was discharged.

Parker Chief Justice said, the Merits of the Case appeared to him very extraordinary, on granting the *Habeas Corpus* the Defendant went a sporting with a Gentleman of 300*l. per Annum*, to take Care of his Dogs, that such Persons ought to be taken as Servants, and the Justices should not commit in that Case.

Regina

Regina v. ——

PARKER, Chief Juſtice: You cannot move for an *Hab. Corpus* without a Copy of the Commitment. *Regula Praxis.*

Kemſter v. *Nelſon.*

REPLEVIN was brought *de una parcella lintei et de una parcella ſericorum, &c.* Defendant avowed, and Verdict for the Plaintiff and intire Damages. Replevin *de unâ parcella lintei.*

Mr. *Brownſel* moved in Arreſt of Judgment, that *parcella* is uncertain, and does not make that which it is applied to, more preciſe than it would be without it; that it would be ill in Trover, but more in Replevin, becauſe a greater Certainty is required as there muſt not be only Damages on the Statute of *H.* 8. but Judgment alſo for the Return of the Goods, which muſt therefore be deſcribed in Certainty, that the Sheriff may know what to deliver. 2 *Lev.* 176. *Vent.* 105. *Allen* 32. *Stile* 71.

The Court inclined to be of this Opinion, and ſtayed Judgment *quouſq; &c.*

Regina

Regina v. ——

Ret. de Certior'.

CERTIORARI iſſued to a Juſtice of Peace to remove ſome Convictions of a Baker upon the Aſſize of Bread, who returned that he certified them to the Quarter-Seſſions, *et ideo ill' coram D'nâ Reginâ ad diem et locum infraſcript. habere non potuit.* The Court held this to be inſufficient, and that the Certifying to the Seſſions was only for the ſafe Cuſtody, but notwithſtanding they muſt be returned to the Court.

Rule was made upon Mr. *Fowler* the Juſtice to return the Records.

Kinbar v. *Gardiner.*

Aſſump. Plea Delivery de Choſe al Pl. inde accepit in Satisfaction.

INDEB. aſſumpſit, Defendant pleaded that *Tiel jour et lieu dedit et delib. quer.—furfuris, Anglicè, Bran et quer. inde acceptavit* in *plen'* Satisfaction, and to this the Plaintiff demurred.

Mr. *Forteſcue* for the Plaintiff objected that the Plea was ill, becauſe the Delivery was not alledged to be in Satisfaction, but only the Acceptance, *et quicquid recipitur, recipitur ad modum ſolventis*; that if the giving was not in Satisfaction, the Application of the Acceptor would not make it ſo; for this he cited *Pinnel's* Caſe, 5 *Co.* 117. *Stile* 263. *Brownl.* 490. *Thompſ. Ent.* 305.

Mr.

Mr. *Brantbwaite* for the Defendant endeavoured to diſtinguiſh this from *Pannel*'s Caſe, which was upon an Obligation, by ſaying, this being a *parole* Contract might be diſcharged by *Parole*, and the Plaintiff's Acceptance in Satisfaction and Diſcharge amounted to that, and quoted 5 *Mod.* 86. *Cro. Car.* 279. but *per Forteſcue*, that Caſe in *Cro. Car.* has often been denied for Law, for Promiſes upon Conſideration executed cannot be diſcharged by *Parole*, but Promiſes upon Conſideration executory may, *quod Eyre J. conceſſit.* Caſe intended is in *Cro. Jac.* 254. *Yel.* 192.

Parker, Chief Juſtice: The Acceptance muſt certainly follow the Intent of the Delivery, but the Queſtion here ſeems to be upon the Conſtruction of the Words of the Plea, whereby the *plen.* Satisfaction may equally be referred to the Delivery and Acceptance, the Verbs being joined and made an intire Sentence by the copulative *et*, the Time and Place are both put before *deliberavit*; but it cannot be pretended but that here it is a good Name for the Acceptance notwithſtanding that; if then theſe Words may be communicated to the Acceptance, why may not *plen.* Satisfaction be likewiſe communicated to the Delivery?

Eyre Juſtice: I believe you will find the Plea in thoſe Caſes to be drawn different from this, and made ſeparate Sentences; *defend. dedit, &c. quæ quidem, &c. quer. accepit in plen.* Satisfaction, there was no Room for ſuch a Conſtruction, but here there may.

Adjournatur.

Nota;

Nota; On the last Paper Day this Case of *Kimber* and *Gardiner* came on, and by the whole Court the Payment in Satisfaction was held to be well alledged; but Mr. *Fortescue* took another Exception to the Plea, *viz.* the *Narr.* consisted of three Counts for fifteen Pounds each, and the third sets forth that in Consideration that the Plaintiff had delivered the Defendant a Gelding, he promised to deliver the Plaintiff twenty Quarters of Bran on a certain Day; the Defendant pleaded that after the Day he delivered to the Plaintiff twenty Quarters of Bran in Satisfaction of the Promise, which he said was wrong upon the Reason of *Pinell's* Case, because the Thing could not be a Satisfaction for the same thing and two fifteenths besides; but *Parker*, Chief Justice, thought this differed from the Case of Money which is always of a certain Value, and though Goods could not go in Satisfaction of the same Goods, and somewhat more, upon the very Day, yet at another Day they might, because possibly the Price might rise so as to make the Satisfaction adequate; but *Eyre* and *J. Powis*, Justices, *semblent* that something ought to have been shewn by the Plea to induce the Court to think there was such an Advantage to the Plaintiff.

Adjournatur to the next Term.

Hitchcock's

Hitchcock's Caſe.

MR. *Whiteacre* moved for the Defendant to ſet aſide a Judgment for Irregularity after a Writ of Error brought in the Exchequer Chamber, and *per Parker*, Chief Juſtice, You come too late; this is like a Motion for a new Trial which goes to ſet aſide the Verdict, after one in Arreſt of Judgment is founded upon the Verdict, the Writ and Return, admitted that there is a Judgment.

Simons and *Alexander*.

THE Plaintiff brought Debt *pro eo quod* Defendant *quoddam agreament. ſuum in ſcript. ſigillo ſuo ſigillat. promiſit ſal. et tal ſuum.* Upon *Nil debet* pleaded, and Verdict for the Plaintiff, Mr. *Salkeld* moved in Arreſt of Judgment, that there was nothing in the Declaration to ſupport an Action of Debt, no Conſideration being laid of the Promiſes, nor the Agreement ſhewn to be by Deed, that *per factum ſuum conceſſit*, or *per ſcript. obl. ſuum conceſſit*, implies a Deed, but here it is otherwiſe, the *Sigillat.* will not mend it, for that does not make a Deed by Delivery, that if this Declaration had been upon a Deed, *Nil debet* had not been a Plea to it, but *Non eſt factum.*

Debt brought *pro eo quod quoddam Agreament. in ſcript. ſigill. ſuo ſigillat'.* See 10 *Mod.* 285.

Cro. Eliz. 571, 737. *Cro. Jac.* 420.

The Court thought it ill for this Reaſon, *ſed adjournatur.*

—— v.

— V. —

Constr. del Rule to bring in Principal, Interest and Costs.

PER *Parker* Chief Justice, upon a Rule to tax Principal, Interest and Costs upon a Bond, the Master is to have Regard to the Agreement of the Parties as to Interest, and if the Plaintiff has constantly taken four or five *per Cent.* is not to allow more; *sur* Mr. *Whiteacre*'s Motion.

Societas Africana v. *Mason.*

Debt *sur obl.* with special Bonds, Plea of Performance, general Breach assigned uncertain. 10 *Mod.* 227.

DEBT upon a Bond, the Defendant prays *oyer* of the Condition, which was, that whereas the Company had appointed the Defendant their Receiver of a certain Duty at *Bristol*, that if he should remit and pay to the Company all such Sums of Money as he should receive from any Person, or Persons, for the Use of the Company, in due Time, and also should, when required, give up his Commission, and pay the Company all such Sums of Money as should be in his Hands at that Time, then, *&c.* A general Performance was pleaded, to which the Plaintiffs reply a Breach, that the Defendant *apud London recepit de quodam Jacobo Reynorson et al. Personis divers' Denar. Sum. in toto se atting' ad —— ad opus et usum Societat' præd' (eisdem Denar. Sum. præd')* and that he had not paid it to the Company; Defendant demurs, and shewed for Cause the Uncertainty of the Breach.

Mr. *Lutw.* for the Defendant took two Exceptions to the Replication; 1. that the

the Breach aſſigned was too general and uncertain, but as to the Sums and Perſons of whom he received, that before the late Statute he could not lay more Breaches than one to intitle him to the Penalty, and that this pleading *de diverſ. al. perſonis* is worſe, being more dark and involved, and the Defendant leſs informed how to apply this Defence. 2. That this Breach is not within the Condition, which by the Recital is tied up to Monies that he ſhould receive upon the particular Duty at *Briſtol*; they ſay that he received Money of *J. R. apud London.* Now though perhaps it might not be neceſſary to lay the *Venue* at *Briſtol*, yet it muſt be ſhewn that the Money was received upon that particular Day.

2 *Saund.* 403, 411. Ld. *Arlington* v. *Marrick.*

Mr. *Ward* for the Plaintiff anſwerd;

1. That though a Breach aſſigned on the Condition of a Bond muſt be ſingle, yet it muſt be underſtood according to the Matter, which, if complex in its Nature, ſuch general complicit pleading had been allowed, *Lev.* 94. *Keb.* 497. *Lut.* 580. *Trin.* 11 *W.* 3. *Roderick*'s Caſe, *Mich.* 4. *Annæ*, *Chambers* and *Preſton*, that this was to avoid Prolixity of Pleading, for which Reaſon the Judges had at laſt allowed the Plea of Performance generally, which was not held good till Queen *Elizabeth*'s Time, in the Beginning of *Cro. Eliz.* 253, 749, 916.

2. That

2. That the Breach was within the Condition, being upon the Non-payment when required, and not upon the Receipt of the Sums, which was but Inducement; that the Condition was to pay all Monies of the Company, that ſhould be in his Hands, when required, and not tied up to the Recital as to the Particular Duty there mentioned.

Diverſity between Breach in an Action of Covenant and in Replication by Bond for Performance of Covenants.

Eyre Juſtice: I cannot think the Caſe in *Law.* 94. to be Law for the Reaſon given, for the Judgment ſeems to fly in the Face of it, and proves the Replication to be ill, for, contrary to the Diſtinction in that Caſe, a general Aſſignment in a Declaration of Covenant has been allowed, becauſe the Plaintiff is to recover only Damages, and can have no more than he proves; but in a Replication upon a Bond for Performance of Covenants it is otherwiſe, becauſe the Defendant is liable to an extraordinary Penalty; and therefore ought to be at a greater Certainty for his Defence.

Words of Condition muſt be conſtrued by Recital.

Brigſtock v. *Stavion*, *Mich.* 8 *W.* 3. in *C. B.* was adjudged upon this Diverſity, the Condition cannot be taken at large, but muſt be tied up to the particular Matters of the Recital, and ſo is the Caſe of the Lord *Arlington*, in 2 *Saund.* which is in Point.

Parker Chief Juſtice: The Caſe in *Law.* may be Law as to the Judgment, though the Reaſon is bad, for the Breach is upon an Imbezilment of Monies received of different Perſons, and it would be exceeding difficult to ſay what

what particular Sums, and of what Perſons received, the Defendant imbezilled in ſuch a Caſe; but in the Caſe at Bar the Replication is double as well as uncertain, and that is ſhewn for Cauſe, which is not in the Caſe cited, and therefore they would not be Authorities here, though there were Judgments in them; the Breach is certainly not within the firſt Part of the Condition, being not tried upon the later Words as general at Law, you ſhould have brought yourſelves within them, and ſhew the Money to be in his Hands at the Time of the Requeſt, which is not done.

J. Powys Juſtice: If the Breach had been *de diverſis perſonis* generally, that would have been ill no Doubt, and the Addition of one particular Perſon, *viz. J. R.* will not help it.

The Plaintiff prayed Leave to diſcontinue upon Payment of Coſts, *quod fuit conceſſum per Cur'.*

Regina v. *Rawlinſon.*

SIR *Peter King* moved to quaſh an Indictment for exerciſing the Trade of a Barber, not having ſerved an Apprenticeſhip, *per ſpatium quinque menſium aut amplius* 1 *die Decemb. et continuat' inde uſque* 15 *Maii.*

Indictment for 5 Eliz. c. 4. for exerciſing a Trade not having ſerved an Apprenticeſhip.

He objected firſt, that this included five Months and a Fortnight, ſo that it was uncertain what five Months it was for, and could

not be pleaded to another Indictment for the ſame Offence; *ſed Parker* Chief Juſtice, it is void for all above five Months, from the firſt of *December* to the fifth of May, ſince the Reſidue is leſs than a Month.

Second Exception: Not ſaid the Jury was impanelled; *ſed per* Chief Juſtice, that is a ſuperannuated Objection, *venerat'* is ſufficient.

Third Exception: It is laid that the Defendant was not a Perſon who exerciſed that Trade at the Time of making the Act 5 *Eliz. c.* 4. *infra Angl. vel Walliam.* If that be neceſſary, it ſhould be laid according to the Act which mentions Perſons who did not exerciſe the Trade at all at that Time, and do not confine it up to *England* and *Wales*. *Sed per* Chief Juſtice: That Averment was neceſſary, the Objection is ſuperannuated now, though it lived above one hundred Years.

No *regnum Angl.* ſince the Union.

Fourth Exception: Averred that the Trade of a Barber is a Trade *infra hoc regnum Angliæ*, no ſuch Kingdom ſince the Union.

Upon the laſt Exception the Court made a Rule to ſhew Cauſe.

Ward

Ward v. *Reynolds.*

Words held actionable *quod* import killing.

CASE for these Words, ſpoke of the Plaintiff, being a Widow, "I know you "very well; how did your Huſband die?" To which the Plaintiff anſwered, "As you "may, if it pleaſe God." To which the Defendant replied, "No, he died of a Wound "you gave him." On not guilty pleaded Verdict found for the Plaintiff; and now Serjeant—— moved in Arreſt of Judgment that the Action did not lie, for that the Words did not import a Charge of Murder, but the Woman might have given the Huſband a Wound of which he died by Accident or Misfortune. Caſes where Killing was not held to import Murder, *Rol. Abr.* 72. *Godb.* 181. 2 *Brownl.* (the ſame Caſe) 3 *Cro.* 239. 2 *Buſt.* 10.

Serjeant *Prat pro Quer.* cited Caſes where "you killed *J. S.*" was held to import Charge of Murder. *Cro. Eliz.* 400, 823. *Cro. Jac.* 489.

Parker Chief Juſtice: The Action certainly lies, the Words in the whole Frame of them are ſpoke by Way of Imputation, and as to the Nature of Killing, be it which way it will, a Man ought to be brought upon his Trial for it, and that anxiently upon common Fame: It is very odd, that after a Verdict a Court of Juſtice ſhould be trying whether there may not be a Caſe in which Words ſpoken

by way of Scandal might be innocently ſaid, whereas, if that were in Truth the Caſe, the Defendant might have juſtified.

L. Powys and *Eyre* accord.

J. Powis Juſtice: The Latter Caſes ſay, *you killed, &c.* is actionable, then theſe Words muſt be ſo, for they certainly import that, the whole Manner of them is malicious.

The Plaintiff had Judgment *per tot' Cur'*.

Regina v. *Brown.*

Conviction on the new Stat. of Aſſize of Bread quaſhed becauſe Evidence not ſet forth.

SIR *Peter King* moved to quaſh a Conviction of a common Baker for ſelling Bread contrary to the Aſſize, becauſe the Witneſs was only ſaid to be ſworn *de et ſuper veritate præmiſſ.* which was granted. *Et per Eyre* Juſtice: This is a Conviction in Default of Appearance, which I very much doubt whether the Juſtices can do in this Caſe, no expreſs Power being given by the Statute as in many others of like Nature.

Regina v. *Grey.*

A LIKE Conviction, Exception *teſtis præſtat ſacr'um ſuum de veritate materiæ in inſ format' præd' content', et fuit* quaſhed *per Cur'*.

Regina

Regina v. *Randal.*

ANOTHER Conviction (*ut ſupra*) quaſhed on Mr. *Whitacre*'s Motion, being only *ſacr'um præſtat corporale de veritate querimoniæ præd'*.

Regina v. *Robſon.*

MR. *Salkeld* moved to quaſh an Indictment, being *quod per ſacr'um proborum et legalium hominum qui jurati et onerati exiſten' præſentat' exſtitit.* Indictment. Poſt

1 Exception, That *exſtitit* is in the Preter Tenſe; *ſed per* Chief Juſtice, heretofore they fancied there was ſuch a Word as *extito*, and therefore it has been alledged well.

2. That the whole Sentence is Nonſenſe, and jumbles two different Forms together, *viz. juratum pro Domina Regina ſuper ſacr'um ſuum præſentant* and that *per ſacr'um præſentat. exſtitit.*

Per Eyre Juſtice: There was a Caſe of *Regina* v. *Ford*, where that Exception was overruled.

Adjournatur.

Twaites v. *Shaw.*

Words importing a Charge of Forgery held actionable.

CASE was brought for theſe Words, "*Twaites* has hired ſeveral Perſons to "make falſe Powers to receive Seamens Wa- "ges, and I will bring one *Jemy* in the "*Poultry Compter* and a Man to ſwear it, and "*Twaites* had advanced ſeven Pounds to them "to get the Power made, I make no Doubt "but I ſhall make *Twaites* peep through a "Pair of Wooden Grates, and I will give "you 50 Guineas if you will join with me "in proſecuting him."

The Jury found for the Plaintiff, on Not guilty pleaded; and now Mr. *Dee* moved in Arreſt of Judgment, that the Words are not actionable, becauſe of an uncertain Signification, *Hob.* 249. the making falſe Powers do not import forging Letters of Attorney, for Powers is not a proper Term for that, and *Falſe* may ſignify only defective, *Stiles* 5. "You are a Witch," held not actionable, *Lev.* 150. *Sid.* 376. "Thou art a ſacrile- "gious Fellow, and commits Sacrilege every "Day," not actionable, *Sid.* 438. "A Pimp "and a Bawd, and fetcheſt young Gentle- "women to young Gentlemen every Day," not actionable, 2 *Saund.* 307. "You are a "cheating Fellow, and keep falſe Books," ſpoke of a Draper, but not laid with a *Col-loquium* of his Trade, and held not actionable. Suppoſe falſe Powers, *&c.* will import forged Letters of Attorney, yet theſe Words are not actionable,

actionable, for Letters of Attorney do not *ex vi Termini* imply Deeds, and all Forgery not indictable. *Hob.* 305. *Sid.* 16, 155. *Lev.* 112. 3 *Leon.* 231. "Thou haſt forged my "Hand," not actionable, the ſubſequent Words relate only to the Proof of this, and the laſt Words of peeping through a Pair of Wooden Grates are merely uncertain; if they can be taken to ſignify any Puniſhment, it muſt be the Stocks, and that is not the proper Puniſhment for Forgery; ſo nothing can be inferred from thence, like the Caſe in *Rol. Abr.* 70. *pl.* 19.

Serjeant *Richardſon contra*, cited 3 *Cro.* 607, 554, 853. *Owen* 47. *Rol. Abr.* 66.

Parker Chief Juſtice: Scandalous Words being general, is a very ſtrange Objection to them, for it is ſo much the harder for the Plaintiff to defend himſelf againſt the Effects, and the Defendant's Defence in the Action will be the eaſier, ſince any Thing within that Generality will juſtify the Words; Powers to receive Seamens Wages is as well and commonly underſtood as Letters of Attorney, and the Words in their natural and proper Senſe import Forgery, the Hearing indeed doe snot make the Crime the greater, but it makes the Act deliberate. Defective inſufficient Powers cannot properly be called falſe, the Miſtake of the Puniſhment does not alter the Caſe cited of coining.

Autres Juſtices accord, et iſſint Judgment fuit done pur le plt per tot cur.

Mohun's Caſe.

Regula praxis. Privilege.

PER Parker Chief Juſtice: The Court cannot give Coſts on *Nonpros* for want of a Declaration on a Writ of Privilege, for that Caſe is not within any Statute for giving Coſts.

Cancellarius et Scholares Univerſitatis Cantabrigiæ v. *Crofts.*

10 Mod. 207. Poſt.

THE Plaintiffs brought a *Quare impedit* by Name of Chancellor and Scholars of the Univerſity of *Cambridge*, to preſent to the Charge of *Long Addingham* in *Yorkſhire*, upon the Statute of 3 *Jac.* 1. *c.* 5. for veſting the Preſentations of Benefices belonging to the Popiſh Recuſants in the Univerſities, and ſet forth the Convictions of Sir *W. Vavaſor* the Patron. The Defendant prays Judgment of the Writ, and pleads *quod quer' nominat' et incorporat' ſunt, et die impetrationis Br'is nominat'. et incorporat' fuer' per nomen Cancellar', Magiſtrorum et Scholar' Univerſit' Cantabr. et non per nomen Cancellar' et Scholar' Univerſii' Cantabr. ſive aliquo alio nomine, &c.* To this the Defendant demurred, and Judgment of *Reſp. Ouſter* was given in *C. B.* Upon this the Defendant pleaded *Nul tiel Record* of the Conviction, which being certified, Judgment Final was given for the Plaintiff, and a Writ

Writ of Enquiry awarded upon the Statute of *W.* 2. The Defendant brought a Writ of Error; and the principal Error assigned was that the Judgment of *Respond' ouster* was erroneous, and the Writ ought to have abated.

Mr. *Reeves* (*pro Quer' in error.*) argued that it is essential to a Corporation to have a Name, and it is like a Name of Baptism in a particular Person, and if mistaken may be pleaded in Abatement; he admitted that a Corporation may have one Name of Incorporation, and another to sue by, but in this Case it was confessed that the Plaintiffs were incorporated by the Name of Chancellor, Masters and Scholars, and nothing appeared on the Record to shew that they had any other Name. *Sutton's Hosp. Case.*

That there are many Cases in the Law where a Grant of Lands might amount to give a new Name to a Corporation, but that all of them stood upon their particular Reasons, which could not affect this Case.

That it is a general Rule laid down in the Case of *Alton* and *Woods*, 1 *Co.* 52. that the King's Grant shall not enure to a double Intent, and that the Statute is within the Reason, and must be taken by the same Rule. *King's Grant not to enure to double Intent.*

That the College of Physicians in *London* have one Name of Incorporation, and another to sue by, but in an Action brought by them against Doctor *Salmon*, *Trin.* 13 *W.* 3. *Holt* Chief Justice held that it was well brought by their *Where one Name of Incorporation, and another to sue by, may sue by the Name of Corporation.*

their Name of Incorporation, and if the Matter had been *res integra* and undetermined, he ſhould have held it ill if it had been brought by the other Name.

Corporate Name need not be ſtrictly purſued in Grants.

That in the Chancellor of *Oxford*'s Caſe, 10 *Rep.* 57. the Donation made to the Univerſities of theſe Preſentations is put on the ſame Foundation as the Caſe of a Will, and therefore any Deſcription, whereby the Donee may be certainly known, will be ſufficient. 3 *Cro.* 106. So that is not the Caſe of Grants, the corporate Name need not be ſtrictly purſued, whether made to or by Corporation. *Lane* 34.

But *autrement* in Writs.

But in Writs the ſame exact Name, *idem ſyllabis et verbis*, muſt be ſtrictly purſued. 10 *Rep.* 225. *b.* 27 *H.* 3. 85. 4 *Inſt.* 3. 6 *Co.* 65. 11 *Co.* 21. *Stat. de terris Templar.* 17 *E.* 2.

All the Precedents in theſe Caſes are by the Name of Incorporation. 10 *Rep.* 53. *Hob.* 126. *Winch* 659, 881.

The Declaration is defective, in that it does not ſufficiently appear, that the Patron Sir *W. V.* is a *Recuſant convict*, for want of an Averment, that he was above the Age of ſixteen at that Time, which is the Qualification required by the Act, and comes in here only under the Recital of the Indictment.

Mr.

Mr. *Lutwyche* (for the Defendant in Error) insisted, that the Statute granting to the University by the Name of Chancellor and Scholars, had enabled them to sue by it, that the Law was contrary to the Rule in 1 *Rep.* 52. for that the King's Grant should enure to a double Intent, so as by the same Words to incorporate and grant; that the Case of a Statute is stronger than that of a Charter. Corporation may sue by the Name of the King's Grants.

It is admitted that the Grant of a Subject to the Chancellor and Scholars of the University of *Cambridge* would be good, then it is no material Variance, and must have the same Construction here. *Leon* 190.

In the Case of the *College of Physicians* it was held good both Ways, and for the same Reason it may be so here; the same Resolution was *Mich.* 1 *Anne*, *Præsc. et Coll. v. Rolls.* 2 *Cro.* 121.

Objected that the Plea in Abatement is ill pleaded, that a Plea in Abatement ought to be certain to every Intent, and take off every Case that might possibly make the Writ good.

This Plea amounts to no more, than that on the Day of purchasing the Writ they were incorporated, *i. e.* had their Charter given them.

By such a Name, now this may be true, and yet before that they might be a Corporation by

by the Name of Chancellor and Scholars, or in Caſe they were not incorporate at all by any particular Charter, then this Act muſt of Neceſſity incorporate them by that Name, to enable them to take, and it doth not appear that they loſt their firſt Name, for no Acceptance is ſhewn of that Incorporation.

That this Caſe ought to be taken as favourable as poſſible, becauſe of the Difficulty of juſtifying under this Act, appears by the Caſe of Lord *Peter's* and the Univerſity of *Cambridge*. 3 *Lev.* 232. 2 *Lutw.* 1109.

As to the Exception to the Declaration it is admitted, that the Age is ſet forth in the Indictment, which being a Judgment by Default muſt now be taken to be true.

Grant of Lands amounts to Corporation for Neceſſity.

Mr. *Reeves* (replied): If they had ſuch a Power of ſuing by a different Name, that ought to have been ſhewn by their Replication.

Here is no Neceſſity for the Conſtruction of a double Intent, for the Univerſity was a Body Corporate before, and might take by this as a Deſcription, but if that were otherwiſe, ſurely it does not follow that becauſe the Act grants a Capacity to take, that therefore it ſhould give a Capacity to ſue or grant.

King's Grants conſtrued in a double Intent, only for the Benefit of the Crown.

The Caſes, where the King's Grants have been conſtrued to a double Intent, have been generally for the Benefit of the Crown. 7 *E.* 4. 14. As where a Rent has been reſerved in

in Order to enable the Crown to demand that Rent, and in *Dy.* 100. it is held, that if the Rent be releaſed the Corporation is *ipſo facto* diſſolved.

Parker Chief Juſtice: As to the Exception to the Plea, it is that they are now, and ſuch a Day were named and incorporated by this Name, and none other; the Word *Incorporation* does not ſpeak the Act but the Effect of an Incorporation, otherwiſe you muſt upon this Plea extend the ſame Act to different Times.

A Plea of Miſnomer of Corporation, if they have Power to ſue by that Name, they muſt ſhew it.

If the Univerſity had a Power of ſuing by another Name, that ſhould have been ſhewn on their Part, and not the negative Part on the other Side.

There is no Occaſion to make theſe Words *incorporating Words*, for the Effect of them is to inveſt this Inheritance in the Chancellor, Maſters and Scholars, who were a Corporation before; and therefore that Effect may be attained without making theſe Words *incorporating Words*.

Eyre Juſtice: I cannot think it a Conſequence that, becauſe theſe Words are a ſufficient Deſcription to take by, therefore they muſt give a Name to ſue by.

Suppoſe a Deviſe to the Univerſity of *Cambridge*, could they ſue by that Name, or to the Church of St. *Andrew*, *Holborn*, which

is

is held to be a Deviſe to the Patron, could the Parſon ſue by the Name of the Church?

Rol. Abr. 513.

L. and *J. Powis* Juſtices *ſemble contra.*

Curia adviſare vult.

Larder and *Paſhem.*

Debt *ſur obl'*. Plea, Bond given *pro comparentia*, &c. and aſſigned *juxta*, and held ill, Conditions not ſhewn. * 5 *An. c.* 16.

DEBT upon a Bond to the Sheriff, the Defendant pleaded that the Bond was ſealed and delivered *pro comparentia ipſius def'tis* upon a *Latitat* iſſued againſt him, and that the Sheriff aſſigned it to the Plaintiff in the original Action according to the * Act for Amendment of the Law; the Plaintiff replied that an Attachment iſſued out of Chancery, and that this Bond was given for the Defendant's Appearance on that, and traverſed, *abſque hoc*, that it was delivered *modo et forma*, &c. to which the Defendant demurred, and ſhewed for Cauſe, that the Plea traverſed Matter not material nor traverſable.

Parker Chief Juſtice and *Eyre* ſaid the Plea was ill, having only alledged that the Bond was given *pro comparentia def'tis*, which could not appear but upon *Oyer* of the Condition, and unleſs that was ſufficiently ſhewn, the Bond could not appear to be aſſignable, that it differed from the Plea on the Statute of 23 *H.* 6. *c.* 9. to a Sheriff's Bond.

The

The Court gave Judgment for the Plaintiff *nisi causa* within a Week.

Sir *Joshua Sharp* v. *Major' Co'itat' et Cives London.*

LAST Term a Writ of *Mandamus* issued, directed to the Mayor, Commonalty and Citizens of *London*, to swear and admit the Plaintiff into the Office of a Common-Councilman for *Cheap Ward*, and the same Term two more issued upon the same Right.

Mandamus directed to the Corporation of *London* to swear a Common Councilman.

Motion before the Return to supersede for the Misdirections; Court divided.

The first Day of this Term a Motion was made to supersede those Writs, upon a Suggestion that they were misdirected, and Affidavits were read, whereby it appeared that the Constitution was, that the Alderman of the *Ward* was a proper Officer to swear, and in his Absence or Default the Lord *Mayor*, and that there was no Instance of its being done by the whole Body, but that in this Case the Common Council, as Representatives of the Body Corporate, had got the Writ into their Custody, and taken upon them the Execution.

Question 1. Whether *Mandamus* may be directed to the Body, when the Power to do the Act is lodged in a particular Person? 2. Whether if *Mandamus* has issued upon a wrong Suggestion, the Court can supersede before the Return, *quia improvide Emanavit*.

After

After hearing Counſel on both Sides and great Conſideration, the Court delivered their Opinion *ſeriatim.*

Mr. Juſtice *J. Powis:* Before I enter into the Conſideration of the Law, I muſt obſerve that the Writ was moved for very early laſt Term, and that fairly, being ſpecially prayed (as appears by the Minutes) to be directed to the Mayor, Commonalty and Citizens of *London*, which is the corporate Name, and ſerved on the twelfth of *February*, which was the next Common-Council Day afterwards.

It has been moved that this Writ, being directed to the whole Body by the Corporation Name, is wrong directed, and therefore ought to be quaſhed.

Whether the Direction be right or wrong, I do not think it neceſſary to declare any Opinion, but hold that it ought not to be quaſhed on a Motion.

I agree that, if the Court had been impoſed on, and the Motion made in great Abuſe of the Court by alledging a falſe Fact, it might have been quaſhed on a Motion; that the Court have ſuch a Power appears by *Grey's* Caſe, which was a *Mandamus* to Sir *Richard Reines* to grant Adminiſtration; and afterwards it appeared on Motion that the Deceaſed had made a Will, and the Plaintiff was ſummoned into the Spiritual Court to prove it, and

and ſtood out in Contempt of that Proceſs, whereby it was plain that no ſuch *Mandamus* ought to have iſſued, and the Court quaſhed it.

But this Caſe is otherwiſe, and we ought to wait for a Return, ſince in my Opinion it does not certainly appear that the Writ is wrong.

I am rather inclined to think the Direction is right, *Eaſtwick*'s Caſe, *Stile* 32. the *Mandamus* is directed by the corporate Name, and it is there ſaid to be the only proper Way of Direction; 3 *Bulſt.* 189, 190. is ſtronger, *Rol. Rep.* 409. Sir *Thomas Holt*'s Caſe, 2 *Hil.* 11 *W.* 3. *Jones* 51. *Mandamus* was quaſhed becauſe directed to the proper Officer to do the Act, and not the Corporation, 3 *Keb.* 667, 668. held *per Holt* Chief Juſtice in the Caſe of the Mayor of *Abington*, that it might be good either Way. *Dy.* 333. A *Mandamus* to reſtore was directed to the Mayor, Aldermen and Sheriffs of *London*.

But it muſt be admitted that there is great Variety in the Caſes of Directions of theſe Writs, ſome being to the Perſons amoving, others to the Corporation, ſome to the Commiſſioners for regulating Corporations on the Corporation Act, as the Caſe of *Hurſt*, who was removed from being an Attorney of the City Court of *Canterbury*.

A Difference was taken at the Bar between *Mandamus* to ſwear and thoſe to reſtore, as to

the Direction, but there is no Warrant for that in the Books, and in this Case I observe it is to admit as well as to swear, and that being to let a Member into the Body is a Corporate Act, and under the same Reason as a Writ to restore.

But if this Matter be only doubtful, I think we ought not to determine it on a Motion, because the doing it may be mischievous, but the refusing cannot. If we determine against the Plaintiff before the Return, we preclude him of his Writ of Error, but the other Side may have their Exception to it on the Return, therefore it seems reasonable for us to see the Return first, which will give us a great deal of Light, for I take it for granted that so great and honourable a Corporation as the City of *London* will make a true Return, and state the Matter right.

It will be harder to do this now when the Writ is gone out, than it would have been to deny it on Motion, and I apprehend this Method will be very mischievous both to the Subject and the Court.

As to the Subject it will induce more Delays than the *Alias* and *Pluries* heretofore, and hinder the Effect of the late Act for making these Proceedings more speedy and effectual, and this Law supplies another Reason against it, (*viz.*) that the Party takes his *Mandamus* at his Peril, and if it be wrong must pay Costs for it.

As

As to the Court, that will be much entangled by it, for we ſhall be to try who is the proper Officer, by Affidavit upon Motion in every Caſe of *Mandamus*.

What makes this Examination the leſs neceſſary is, that a *Mandamus* gives no Right, but the Title to the Office remains juſt as it was before.

Mandamus no right, but the Title to the Office remains as before.

To me it is ſtill very uncertain who has the Right to ſwear in, and where, whether the Alderman after the Wardmote is over, or only the Lord Mayor, and whether he is to do it in or out of Council; beſides that, it appeared in the Motion, that there were Inſtances of the Common Council themſelves intermedling in the Admiſſion of their Members.

Mr. Juſtice *Eyre*: I am ſo unfortunate as to differ from my Brother, for though no Body has a greater Regard for his great Learning and Judgment than myſelf, yet I muſt be guided by my own ſuch as it is.

The Motion was that the Writ ſhould be ſuperſeded, and under that Conſideration we hitherto talked of it amongſt ourſelves, though my Brother now argues againſt quaſhing it; now I agree with him that it ought not to be quaſhed, for that can only be on the Record, but I think it ought to be ſuperſeded, becauſe it iſſued *improvidè*.

For if the Court had been rightly informed of this Matter on the firſt Motion, as they are now, they would not have granted it.

The State of the Caſe is this: The Common Council are choſen yearly on St. *Thomas*'s Day, by Virtue of a Precept iſſued by the Lord Mayor to the Alderman of each Ward, who is to ſummon a Wardmote to chooſe, and then to adminiſter the Oath to them, and return them on the Precept to the Lord Mayor in order to be admitted into the Common Council; in this Caſe Sir *Joſeph Sharpe* and ten more are put upon one Side, and *A. B.* and ten more on the other Side, the Alderman ſwears in and returns to the Lord Mayor *A. B.* and his Company, whereupon Sir *Joſ. S.* and his ten pray *Mandamus* from this Court directed to the whole Body, which is ſerved upon the Lord Mayor.

I am of Opinion that this Writ ought to be ſuperſeded, becauſe ill directed.

To form a Judgment in this Caſe, two things are conſiderable; what the Court would have done in Caſe this had been an original Motion, and all this Matter had appeared.

2. What the Court can do ſince the Writ was iſſued, and not returned, and whether we can now take Notice of this Matter.

As to the firſt, if this was an original Motion, I think the Writ ought to have been directed

rected to the Lord Mayor, and not to the Corporation, because it appears that he has the Right and Power to execute it, and that the Common Council, who are the representative Body, have not.

It was said at the Bar, and my Brother thinks that where an Act is to be done by a particular Officer, the Mandatory Writ is to be directed to the Body who have the Inheritance. Cases have been cited to prove that it must necessarily be so in the *Mandamus* to restore; and my Brother thinks that a *Mandamus* to swear and admit stands upon the same Foot; but the Cases of *Mandamus's* to restore have been denied to be law since; besides I insist that there is no Comparison between *Mandamus* to swear and admit (which is the same thing, and the latter only a Consequence of the former) and a *Mandamus* to restore.

Eastwick's Case has several Things in it that appeared to be wrong, but on View of the Writ is certainly right, for it is directed to the Corporation to restore, upon a Suggestion that they had removed him. So that it was sent to the Persons who had done the Wrong, which was the proper Way in that Case, but affords no Argument to infer the general Consequence, that such Writs ought always to be so directed.

Sir *Thomas Hull's* Case, *Jones* 53. 2 *Keb.* 668. the Reason of that Judgment is given in *Keble*, and it is, that a Writ of Error to

remove a Record out of an inferior Court ought to be directed to the Lord of the Franchiſe; now that this is certainly falſe, for it muſt be directed to the Judges of the Court.

Holt Chief Juſtice ſaid in the Caſe of the Mayor of *Abingdon*, that Sir *William Jones*, Serjeant *Pemberton*, and all the learned Part of the Bar, wondered at the Reſolution, the Writ ought to go to the Officer that is to execute it, for there can be no Convenience in ſending it to the whole Body, but an Inconvenience there may be, becauſe their Majority may obſtruct it.

N. B. Theſe Citals are of the Bag-roll in the Crown Office, not the Rolls in thoſe *per* C. J.

There are many Precedents in the Crown Office of *Mandamus's* to reſtore, directed to the Perſons that have done the Wrong, and not the whole Body. *Hill.* 14 & 15 *Car.* 2. *Mich.* 29 *Car. rot.* 79. *Paſ.* 2 *W.* & *M. rot.* 35. *Hil.* 2 *W.* & *M. rot.* 40.

But if theſe Writs of reſtoring were always otherwiſe, yet no Conſequence could be drawn from them to a *Mandamus* to ſwear and admit, for that is an Authority or Power not neceſſary to ſubſiſt in the Corporation, but may be in a ſingle Perſon, it is not incident to the Corporation, for if not appointed by the Charter, they cannot do it, but it muſt be by *Dedimus* out of Chancery, as the Mayor of the *Devizes* always is, ſo that however reſtoring may be a Corporate Act, to ſwear is a particular Authority. *Mich.* 34 *Car.* 2. *rot.* 309. *Paſch* 2 *W.* & *M. rot.* 32, 34.

Trin.

Trin. 4 *Annæ*, *Regina* v. *Major' Hereford*, the Caſe of *Eaſtwich* and Sir *Thomas Holt* were cited, and diſallowed, and my Brother *Powel* ſaid expreſly, that Writs ought to be directed to the Perſons who are to obey them, otherwiſe how will People know who is to execute them?

And this is founded on great Reaſon, but the contrary Method, is ſubject to infinite Inconvenience, and confounds all the Diſtinction and Order, which the Crown has appointed for the Diſtribution of a Power of a Corporation, and puts all, at leaſt the Poſſeſſion of all, in the Common Council; this ſurely is very contradictory to the Truſt repoſed in this Court for maintaining that Order which the Crown ſets up.

To direct a Writ to Perſons not having Authority to execute it, is to command them to commit a Crime, and their Obedience would ſubject them to a Penalty, an Information for adminiſtring an Oath without Authority; one would think that upon theſe Reaſons it would have been in the Power of the Court to deny ſuch a *Mandamus*, had the Fact appeared on the original Motion.

As to the ſecond Conſideration, what the Court can do now ſince the Writ iſſued, my Brother doubts whether we can take Notice of this Matter before the Return; but I am of Opinion we may, this being a Truſt in the Court, and we have a Right to look into that Matter, prevent that Injuſtice and Confuſion which

is going on; and it ſeems ſo far from being a Delay to the Party, that it is ſpeeding the Cauſe, and taking them out of a wrong Way to put them in the Right, for if the Common Council ſhould ſwear in the Plaintiffs, they not having Authority, it would be a mere Nullity, and only turn the Plaintiffs round again; the Caſe will be the ſame, whatever they do upon the Writ, whether they return an Obedience, *Non fuit electus*, or that they have not the Authority.

That there is no Neceſſity for this Matter to appear upon the Record, *Grey*'s Caſe is a full Authority. *Mich.* 9 *W.* 3. *Rot.* 73. there the Court ſuperſeded the *Mandamus* upon a Motion, though the ſame Anſwer might have been given there that is uſed here, that the Court ſhould wait till the Fact appeared upon the Return.

This Writ ought to be ſuperſeded, and we have a Power ſo to do, becauſe it was granted upon a wrong Suggeſtion to the Court, and the Recital is falſe; the Recitals of all Writs ought to be according to the Truth, and if this were ſo it would have run thus, That whereas Sir *J. S.* was elected, and the Lord Mayor has a Power of ſwearing, therefore the *Queen* commands the Lord Mayor, Commonalty and Citizens, *i. e.* the whole Body, to ſwear him; ſurely the Court would never have granted ſuch a Writ.

It has been ſaid that the Writ may be directed to the Corporation, and they are to take

take Care that the Member, in whom that particular Power is veſted, does his Duty, but I think it is beneath the Dignity of this Court to pray an Aid of a Corporation to enforce an Execution of their Writ, they have a Right and Power to oblige every Officer to do his Duty.

The *Inſignia* of a Corporation are certainly the Franchiſe and Property of the Body, but we never direct, *Mandamus's* to deliver *Inſignia* to the Corporation, but to the particular Officer.

Upon this Reaſon I am of Opinion that, if this Matter had appeared on the original Motion, the Court would have denied the *Mandamus*, and that the ſame Power remains ſtill in the Court notwithſtanding the Writ has iſſued on a falſe Suggeſtion.

My Brother obſerved that this was a Writ to admit as well as to ſwear, and endeavoured to diſtinguiſh between theſe two Acts, but they are really the ſame, the Swearing is the Admiſſion, and it would be a good Return for the Officer to ſay that he had ſworn him and no more.

Mr. Juſtice *L. Powys:* I am of Opinion that the Writ ought not to be ſuperſeded.

I obſerve that it is not directed to certain wrong Perſons, but to the whole Body *Corporate*, which includes every Part, and the Writ gives no Authority to do the Act to any Part that

that had it not before, therefore it must be taken *reddendo singula singulis*, and they that have the Power ought to execute it.

As the Writ gives no Authority to admit, so it gives no Right to the Person admitted, but is like the Admission of a Copyholder by his Lord.

Here is a Variety of Authorities, sometimes the Aldermen have it, sometimes the Lord Mayor, and when it is to go over from one to the other is not made certain to us. Brother *Eyre*'s Argument goes on begging the Question, for he takes it as if we certainly knew who had the Authority, as if it had been tried, but that does not appear to me.

No Body can say that a *Mandamus* must never be directed to a Corporation in general, for in a doubtful Case, they are the properest to find out who is the legal Officer of their Body to execute it.

On Motions for *Mandamus's* we grant them of Course, and the Person to whom directed must return, when the Matter will be certain; it would Occasion great Delay, should the Plaintiff be put to take out a new Writ, whilst the Business is thus *in Nubibus*; besides it is putting a great Difficulty on the Plaintiff to find out the special Officer, for a Corporation may possibly have a new Charter with a different Distribution of Powers, which he does not know of.

Grey's

Grey's Caſe differs from this here; it appeared that no *Mandamus* ought to go at all, there was a Will, and therefore could be no Adminiſtration, ſo the Foundation was taken away.

I will not ſay that it may not be good both Ways, but the Caſe is not the ſame now, as if it were an original Motion, great Difficulties will be put on the Court to enter on the Examination of the Fact by Affidavit in all theſe Caſes.

Another Thing is, we are not to preſume that a Body Politick will do wrong, let them do it at their Peril.

The Precedents in Print cited are *Eaſtwick*'s Caſe, *Taylor*'s Caſe, *Rol. Abr. f.* 409. where it is ſaid more proper to be directed to the Body Politick than a particular Officer; theſe are better than many Precedents in the Office, which have paſſed *ſub ſilentio* without being litigated.

Hob. 15. It is ſaid that the Privilege is veſted in the Body, though the Execution of it may be in a particular Perſon. I think ſo great a Point as this ought not to be determined on a Motion, but we ought to expect a Return.

Parker Chief Juſtice: There is no Occaſion for me to deliver any Opinion, ſince it appears already that this Writ cannot be ſuperſeded, but becauſe I think it a Noble Inſtitution

rion of the Law of *Englnad*, that Judges are publickly to give the Reaſon of their Judgments, and for the Sake of Juſtice in general, to prevent a Precedent which in my Apprehenſion may be prejudicial, I will do it; the Principal Conſideration is, whether this be a good Writ or not.

The Caſe has been ſtated with great Clearneſs by my Brother *Eyre*, and the ſecond of my Brothers mentioned it as doubtful, yet I take it to be certainly agreed, that the Power of ſwearing is firſt of all in the Alderman at the Wardmote, and afterwards in the Lord Mayor; but though it ſhould not be ſo clear whether the Alderman has then loſt all his Power, yet it is agreed on all Hands that the Common Council never had, never executed that Power.

The Writ is directed *Majori, co'itati et civibus civit' London*, and it ſuggeſts that the Plaintiff was duly elected purſuant to the Conſtitution, *Et in locum et officium ill' per vos ſurari et admitti debuit, &c.*

The Foundation here ſuggeſted is plainly falſe, and therefore the Writ is wrong.

This Court has a Superintendency over all inferior Officers, which it exerciſes in two different Manners.

1. By Mandatory Writs, to make them execute that Authority which they have.

2. By

2. By Information, for uſurping a Power which they rightfully have not.

Now the only Reaſon to make this Writ good muſt be, that it is the beſt Method to oblige the Corporation to execute that Power which is in them.

The Caſe in *Style* is of a *Mandamus* to reſtore, directed to the whole Body upon an Amotion by the Body; what is ſaid by the Court there is that it is well directed, but it is the only way, as ſaid by *Maynard* who argued it; though I agree that it is held ſo in the other Caſes cited by my Brothers; but though my Brothers found themſelves on thoſe Caſes, yet they admit them not to be Law, for they both ſay it may be well either Way, whereas thoſe Caſes ſay the contrary.

The Paſſage in my Lord *Hobart* ſeems to me an Authority directly the contrary Way from that for which it is cited. It is a Privilege that is veſted in the Body in Point of Intereſt, though the Execution may be in a particular Member; this makes a Diſtinction between the Intereſt and Execution, and this Writ relates only to the Execution of the Privilege, not the Intereſt, which is a different Conſideration.

If this were not ſo, it would make ſtrange Confuſion; the Inheritance of the Office of Sheriffs of *London* and *Middleſex* is in the City; can the Mayor, Commonalty and Citizens

tizens of *London*, therefore execute the Powers of the Sheriffs of *London* and *Middlesex*?

So of a Juſtice of Peace in a Corporation, the intereſt is in the Body; ſhall therefore a *Mandamus* to ſign a poor Rate be directed to the whole Body? No Body will deny but this is abſurd.

The only Difference between theſe Caſes and that at Bar is, that in them the Abſurdity appears at firſt Sight, and ſo it does here, when ſhewn; if it be ſaid that thoſe Caſes are only collateral to a Corporation, this of admitting and ſwearing their Officers neceſſary, my Brother *Eyre* has already given the true Anſwer to it, that this of ſwearing an Officer muſt be given to them by ſpecial expreſs Authority from the Crown, otherwiſe they cannot do it.

It is the Duty of the Officer to do it, though it is the Intereſt of the Corporation to have it done.

There is no avoiding the Force of this Argument, but by laying it down for a general Rule, that every Act, done by a Part of the Corporation by virtue of a Franchiſe veſted in the whole, is in Conſideration of Law an Act of the whole Corporation.

If this be true, the Conſequence is, that ſuch an Act muſt be ſo ſet forth in all judicial Proceedings.

If

If ſo, then in Caſe of a *Mandamus* to a particular Officer, and he makes a falſe Return, the Action will lie againſt the City.

If an Information *Quo warranto* be brought againſt an Officer who is to be elected by a ſelect Number, the Election muſt be pleaded to be by the whole Corporation, for if it be the Act of the Corporation, it muſt be ſo pleaded in all Caſes.

And this opens the Way to another Reaſon which was mentioned by Brother *Eyre*, that this Notion confounds all that Order and Diſtinction of Power which the Crown has ſet up in Corporations.

There is a great Difference between a Right to have Officers and a Right to chooſe Officers, the former is in the whole Body at the ſame Time that the latter may be in a ſelect Number, and the Caſe of ſwearing them is the ſame.

No Authority has been cited to prove that the Direction may be good either one Way or another, I have a Note of the Caſe of *Abingdon*, *Hil.* 11 *W.* 3. which I took myſelf in Court, and it appears to be a *Mandamus* to elect and ſwear, and was directed to *James Courteen*, Mayor, and the Bailiffs and Burgeſſes of *Abingdon*, (*exc. A. B.*) an Exception was taken by Mr. *Lechmere*, that it ought to be directed to the Perſons who are to do the Act, and that it would be ill to direct it to the

Corpo-

Corporation, when they have not the Power to do the Thing commanded.

Writs of Reſtitution differ very much from Writs to admit; for

1. They follow the Amotion which is *prima facie* incident to a Corporation, for every Corporation may remove its Members when convict for an infamous Crime by Verdict, though perhaps not in a ſummary Way; Swearing is otherwiſe.

2. Every Act of hindering the Exerciſe of an Office is an Amotion, and if the Office will bear it, may be a Diſſeiſin, and an *Aſſize* may lie for it.

The Caſe of *Hurſt* an Attorney of *Canterbury*, the Reaſon of which was, that the Corporation inſiſted upon the Removal and kept him out, and ſo made it their own Wrong.

That in Caſes of Reſtitution no Authority is wanting, either to the Act of removing or reſtoring; the firſt is doing a wrong Removal *minus juſtè*, and the latter is only the taking away that Wrong, this requires no Authority, for any Man may remove his own Wrong, but ſwearing an Officer is an authoritative Act, and muſt be done by him who has the Authority.

Another Difference is, that Caſes of Reſtitution are generally where the Turning out has been by Common Council, and they make the

the Return without conſulting the Corporation at large, ſo no Body is concerned in the Execution but the proper Perſons; but in this Caſe the Common Council, as the repreſentative Body of the City, may make the Return without the Conſent of the Lord Mayor, who appears to be the proper Officer.

The very Frame of the Writ which is *per vos jurari debet* ſuppoſes it to be directed to the proper Officer to do the Act.

One of my Brothers ſaid that this muſt be taken *reddendo ſingula ſingulis*, and if the Lord Mayor has the Authority, he may execute it, but my Lord Mayor could not do it without the Concurrence of the Common Council, without ſubjecting himſelf to an Information for it, as it was ſaid by *Holt* in the Caſe of *Abingdon*.

But it was held in the Caſe of the Mayor of *Hereford*, that it could not be taken *reddendo ſingula ſingulis*, though the Direction was only to a particular Perſon; much leſs can there be a Diſtribution, being to a Body Politick, which is but one Perſon and muſt be taken intire.

It was objected, that it did not appear that the Alderman's Power was quite gone, but though he ſhould have a concurrent Authority, the Writ might be well enough directed to Mayor, and either of them might obey it; in the Caſe of *Abingdon* it appeared the Recorder had a concurrent Authority, and it was

held he might obey the Writ, and if this were otherwiſe, the Writ might be directed to both of them, and ſuggeſt *per vos vel unum veſtrum jurari debuit, &c.* but the Expedient propoſed in this Caſe is, that becauſe either the Mayor or Alderman hath the Authority, and it is doubtful which of them, therefore we muſt direct the Writ to neither, but to thoſe who without all Doubt have not the Authority.

As to the Diſtinction made by my Brother between admitting and ſwearing, it is not pretended that there is any Difference between them in this Caſe; my Brother indeed made it to be the Caſe of admitting a new Member into the Body, but there is a great Diverſity between that and ſwearing or admitting an Officer; the former is incident to a Corporation, the latter not.

Whereas there is another Ceremony required to the Admiſſion beſides the Swearing, the Denial of that after he is ſworn, is a keeping out, and a Writ of Reſtitution will lie.

The laſt Conſideration is, whether this be a proper Time to ſet this Matter right, or we muſt wait for a Return.

My Brother ſaid that, if the Court had been impoſed upon in granting the Writ, they might ſuperſede it on a Motion, but that the Motion for this Writ was fairly made, but I muſt ſay that it ſuggeſted a Falſhood to the Court.

Every

Every Gentleman who moves for a *Mandamus*, is underſtood to tell the Court that his Client was elected into the Office, and ſuch an one has a Right of Swearing, and if that had been done truly in this Caſe, the Court would have directed the Writ to the Lord Mayor.

It is ſaid that a Delay will be created, and the Plaintiff prejudiced by the Writs being ſuperſeded, perhaps that may be otherwiſe in fact; however that is, ſurely the Court is not concerned that the Plaintiff ſhould take Benefit for having impoſed on them.

But it is ſaid it will be troubleſome and entangle the Court to examine theſe Matters upon Motion; for my Part I am not afraid of the Trouble of doing Juſtice in any Caſe, but in this that Obligation does not hold, for the Matter is agreed at the Bar.

It is ſaid this will appear better upon the Return, but I think it is as certain now, as it can be then, and we may determine upon it as was done in the Caſe of *Grey*. Beſides it may poſſibly never appear on the Return, for the Common Council may ſwear them in.

But then it is ſaid that this Writ cannot give an Authority to ſwear, nor a Right to the Plaintiffs if they ſhould be ſworn upon it, then I ſhould think the Conſequence is, that it is better to ſtop this Writ which can confeſſedly do no good, and may do Miſchief, for it can tend only to Confuſion, and to bring ele-

ven Perſons againſt eleven Perſons in the Poſſeſſion of the ſame Office.

I think the Writ is wrong, the Court were ſurprized in the granting of it, and therefore it ought to be ſuperſeded.

Eyre Juſtice: If the Granting a Writ in this Nature puts it ſo much out of the Power of the Court, that they cannot retreive it, I ſhall expect of every Gentleman who moves for a *Mandamus* hereafter, that he ſhould bring an Affidavit where the Right of ſwearing is lodged, for this will have ill Conſequence.

Regina v. *Patchin.*

Indictment for foreſtalling Goods coming *Mercat. de Darkin vendend'*, held naught *ſur* Demurrer.

INDICTMENT for foreſtalling ſetting forth, that the Defendant bought Goods coming towards *publicum mercatum de Darkin vendend'*, the Defendant demurred, and upon Argument Mr. *Darnel* objected that no Offence was charged, for it did not appear that the Goods were coming towards that Market to be ſold in the ſaid Market, which is the Deſcription in the Statute 5 *Ed.* 6. 14. and cited *Rol. Rep.* 421. 2. *Weſt's Precedents* 109.

Mr. *Lutwych* endeavoured to maintain it by ſaying that the Word *Foreſtalling* was uſed, which was the Term of Art, and what that meant was made certain by the Statute, that the

the other Way would make the Intention neceſſary to be proved, which was impoſſible.

Parker Chief Juſtice: Here want the Words *ibidem vendend'*, for the Statute is ſo, to be ſold in the ſame Market, the Charge muſt be laid in the Words of the Act; what would be ſufficient Evidence of it is another Conſideration.

Charge in Indictment muſt be laid in the Words of the Statute.

Eyre Juſtice: Suppoſe a Man was bringing a Load of Hay towards *London*, not to ſell in the Market, but deliver to a particular Perſon, and another buys it of him on the Road, that is not the Crime of Foreſtalling, and yet it is within this Indictment.

See 31 Geo. 2. c. 40.

Foreſtallabat contra formam Statuti will not help it, for you muſt lay the Fact in the Words of the Act; Suppoſe an Indictment were only that *A.* murdered *B.* that would not be good, for you muſt ſay by a Stroke, *&c.* that Precedent in 2 *Weſt* 109. and another in the ſame Book are wrong.

Per Cur' jud' pro Def' niſi Cauſa ante finem Termini.

Regina v. *Wagſtaffe.*

Order of Juſtices to receive an Apprentice bound by the Churchwardens quaſhed, *quia* Indenture contained a Covenant not according to the Statute, and that avoided the whole Indenture. Fol. 283. Caſe of Set. and Rem. 20.

AN Order of Juſtices upon the Defendant for not receiving an Apprentice bound to him by Indenture by the Churchwardens, *&c.* was returned on a *Certiorari*, and Exception was taken to it, that a Covenant was inſerted in the Indenture to oblige the Maſter at the End of the Term to give his Apprentice two new Suits of Cloaths, one for Holidays and another for Working Days, which the Juſtices had no Authority to do by the Statute. But Mr. *Forteſcue* inſiſted that it was in the Diſcretion of the Juſtices, and that they were proper Judges to ſettle the Covenants of the Indenture, and by the Statute 8 *&* 9 *W.* 3. *c.* 30. the Maſter is to receive him according to the Indenture, but though it ſhould be void as to the Covenant, it would be good for the reſt. But the Court held that this Covenant was void and avoided the whole, becauſe if the Maſter received him he would be bound by the whole Indenture, that the Juſtice could not provide for any Thing to be done at the End of the Term, for they are only to ſettle the Indenture of Apprenticeſhip, and when that is expired their Authority is at an End, that they cannot order any Wages or Money to be paid to the Apprentice during the Term. Quaſhed.

Cole

Cole v. *Hawkins.*

INDEBITATUS assumpsit laid on a Day above six Years ago, and the Request *postea scilicet eodem die et anno.* The Defendant pleaded *quod causa action' non accrevit infra sex annos, &c.* the Plaintiff replied that his Bill was filed *tiel jour*, and that the promise was made within six Years before, *scilicet* at a Day after the Day in *Narr'*; the Defendant demurred, and insisted that the Replication was a Departure. To which the Court inclined, and said that though the Day was not material in Evidence to a Jury, yet it was on the Record, and the Plaintiff could not depart from it, for it was inconsistent for him to say on the same Record, that a Thing which he had alledged before to be above six Years ago was done since that Time.

Indeb' Ass. laid one Day, Stat. of Limitation pleaded, Replication that Promise was made on a different Day. 10 Mod. 251. Post.

Jeffreys and *Barrow.*

MR. *Gilbert* for the Plaintiff, that the Finding of the Jury that the Defendant had Lands by Descent before the *Teste* of the Writ sufficient to satisfy the Debt, was a good Finding within the Intention of the Statute of 3 & 4 *W. & M. c.* 14.

Debt v. *Heir*, Plea *Riens per descent die impetrat' Br'is, Repl. quod fuit ante &c.* Sur 3 & 4 W. & M. Ante.

Held that the Jury muſt inquire of the Value by a par ticular Inqueſt after the Iſſue found for the Defendant.

That the Iſſue is joined on the Sufficiency of the Verdict, having found there could be no Occaſion of an Enquiry of Office afterwards at Common Law; if it were found that the Heir had never ſo little Land by Deſcent, he ſhould be charged with the whole Debt for this falſe Plea, and the Alteration introduced by the Statute was to enable the Creditor to recover after the Alienation of the Heir; but then he is to take the Proof of the Value upon himſelf, and recover no more of the Debt than the Value of the Lands amounted to, but the ſame Replication in Form might be preſerved, only the Time changed from the Day of purchaſing the Writ to a precedent Time.

Inqueſts of Office not made but for Neceſſity.

That Inqueſts of Office are not to be made but in Caſe of Neceſſity, where the Matter cannot appear upon the Verdict, becauſe no Attaint lies on ſuch Inqueſt.

That in this Caſe the Value of the Lands is ſufficiently aſcertained by being referred to the Debt, and it is not like the Caſe of a *Quare Impedit*, where the yearly Value muſt be expreſsly found, for that is the Words of the Statute of *Weſtminſter*.

Adjudicentur damna ad valorem de die de duobus annis, which being returned to the Court they are to adjudge the Damages upon that, but here the Jury are made the ſole Judges, and the Statute does not require the yearly

yearly or other Value to be found; it is like the Caſe of an Executor, and that ſeems to be the Intention of the Statute where the Finding is to the Value of . and in 3 *H.* 6. 34. it was doubted whether a Finding to the Value of the Aſſets beyond the Debt would be good.

Parker Chief Juſtice: The Strength of the Objection in this Caſe is, that the Jury have not found any Value of the Lands at all.

At Common Law the Pleading and Finding were exactly as in this Caſe, except as to the Time in the Replication. So that this amounts to more than a general Verdict for the Plaintiff, as it would have been at Common Law in Caſe any Lands had been found at all, but if this is to be taken as a Reply upon the Statute, then the Words *inſufficien' ad ſatisfac'*, &c. cannot be material, though they ſhould do no Hurt, there the Conſequence of their being not material in the Iſſue is, that they are not ſo in the Verdict, for if he had proved never ſo little, that muſt have been drawn up, or elſe the Finding muſt be for the Defendant, which is contrary to the Intent of the Act. *Mich.* 7 *E.* 2. 14.

The Caſe of a *Quare Impedit* was cited to prove that the Defect of an Inqueſt on Trial cannot be ſupplied now, for it muſt be by the ſame Jury.

Intent of Act 3 & 4 W. 3. c. 14. about Heirs.

Eyre Juſtice: This Act was intended to prevent three Inconveniences; 1. that the Creditor

tor ſhould not be cheated by Deviſe; 2. Alienation; 3. that the Heir ſhould not be charged with the whole by his falſe Plea. But this Method would prevent the Effects of it.

The Jury are no more made Judges of the Damages in this Caſe, than in *Quare Impedit*; but the Court are to judge, upon the ſpecial Finding of the Jury, of the Value how much Debt or Damages they ſhall give Judgment for. *Cheney*'s Caſe 10 *Rep.*

Co. Litt. 355. b.

This is not an Inqueſt of Office, but it is Part of the Duty of the Jury upon this Iſſue to inquire of the Value; and an Attaint will lie for not doing it. *Sid.* 380. *Lev.* 255.

J. Powys Juſtice: If the Verdict had been for the Defendant, it would have been immaterial, and muſt have been ſet aſide.

The Court awarded a Repleader.

Regina v. *Simpſon.*

Conviction for Deer Stealing on 3 & 4 W. & M. c. 10. 10 Mod. 248, 341, 378. Poſt.

MR. *Ager* moved to quaſh a Conviction for Deer Stealing on 3 & 4 *W. & M.* *c.* 10. and took the following Exceptions.

1. That the Information was too general, the Fact being alledged on no particular Day, but between the laſt of *July* and the ſixth of *Auguſt*, during which Time there might be

two

two Owners of the Park, and conſequently it would be impoſſible to know how to diſtribute the Penalty, one third whereof is to the Owner; beſides it would put great Difficulties on the Defendant in making his Defence, for if they may take a Latitude for ſix Days, they may as well do it for ſo many Months, and ſo on; if the Defendant has a Releaſe, and that be dated within the Period, how can he plead that, ſo as to appear to be after the Offence; the like Difficulty will be in Caſe of a Pardon.

2. The Offence ought to be laid to be committed *voluntarie*, for there may be an unlawful Killing, and yet if it be not voluntary nor maliciouſly, not within the Act.

3. This is a Conviction upon Default of Appearance, and no Proceſs is iſſued againſt him, but only allowed that he had notice, the Juſtices cannot convict on Default, for no ſuch Power is given by the Statute, but the Words imply the Contrary, for the Conviction is to be before a Juſtice of the County where the Fact is committed or the Party apprehended.

Mr. *Lutwyche contra:* As to the firſt, that was overruled in Caſe of The King v. *Chandler*, *Hil.* 11 *W.* 3. it is agreeable to the Proceedings in other Caſes. Informations in the *Exchequer* are ſo laid, and in Treſpaſs where a *Continuando* is not proper the Manner is, that between ſuch a Day and ſuch a Day he did the Treſpaſs, otherwiſe he could not give Evidence

Evidence of more than one Day, and no Inconvenience can ariſe from this, for in Caſe a Releaſe (which can only diſcharge the Owner's Part of the Penalty, and not the Crime) the Juſtice will inquire of the Time of the Offence, and of the Releaſe; ſo in Caſe of a Pardon.

2. No Occaſion for *Voluntariè*, it is laid in the Words of the Act *illicitè*, and concludes *Contra formam Statuti*, which could not be, if an involuntary Killing.

3. Proceſs not neceſſary, the Statute directs neither Proceſs nor Notice; but the Court have required the latter as agreeable to natural Juſtice, but it is alledged in this Caſe, that if the Appearance of the Party be made neceſſary, the Statute will be wholly eluded, no Power given by the Statute to iſſue a Warrant.

Quære whether Juſtices can convict in Default of Appearance, without expreſs Power given by the Statute.

Parker Chief Juſtice: There is no Reaſon for laying the Charge further than the Words of the Act. If the Killing were involuntary, that muſt come upon Evidence by Way of Defence.

The Iſſue of a Proceſs ſeems to be within the ſame Reaſon as Notice, for that was only that the Party might have an Opportunity of being heard, and the Words of this Act, which direct the Conviction to be before a Juſtice of the County where he is apprehended, ſeem to import that they cannot proceed in his Abſence, but muſt bring him in.

Eyre

Eyre Juſtice: A Power to iſſue a Warrant will be incident to his Juriſdiction. I do not ſee any Thing in this Act to convict upon Default, and regularly that cannot be done in any Caſe, for a Witneſs cannot be examined before ſome Iſſue be joined.

There is a Difference in theſe Laws; the Act of Exciſe give an expreſs Power to proceed on Appearance or Contempt, which is an Argument that where that is not done the Juſtices cannot proceed in that Manner.

J. Powys Juſtice *ſemble accontre:* Becauſe the Statute intended a ſummary Proceeding, which would be defeated by the Conſtruction.

Adjournatur to next *Trinity* Term.

Chilcot et ux. v. *Davis.*

CASE for theſe Words ſpoke of the Wife, "*Betty Chilcot* is a Witch, and has "bewitched *Ned Goodwin* and *Morris*'s "Child of *Luton*;" on Not guilty pleaded it was found for the Plaintiff, and now moved by Mr. *Gapper* in Arreſt of Judgment, that the Action is not maintainable, that to call one Witch generally is not actionable by many Authorities. 3 *Cro.* 324. *Stile* 11, 47. *Keb.* 140. *Rol. Abr.* 44, 45. But in Caſe a particular Charge of Witchcraft has been expreſſed, it has been held good; that here is no

Words held actionable.

no ſuch Charge, for the Words are ambiguous and doubtful; *et benignior ſententia in verbis generalibus ſeu dubiis eſt præferenda.* 4 *Co.* 15. *Hob.* 268, 305. to bewitch one or by one, in common Speech only imports to be under the Influence and Power of that Perſon; *Godb.* 341. here is no Fact laid within the Statute of * *Jac.* 1. for the Words "and "hath bewithed, *&c.*" carry the Matter no further than the general Charge of Witchcraft. *Rol. Abr.* 45. *Godb.* 341. *Hut.* 132, 133. "Thou haſt bewitched me and alſo "my Huſband," held not actionable in *B. C. Mich.* 4 *Anne*, becauſe no Act of Witchcraft puniſhable by the Statute as Laming, Blinding, *&c.* laid. *Sid.* 50. *Cro. Jac.* 299. 3 *Bulſt.* 74.

* This Act is repealed by 9 Geo. 2. c. 5.

King contra: The Expoſition *in mitiori ſenſu* is a Rule long ſince out of Doors; theſe Words were actionable before the Statute of King *James*, *Cro. Jac.* 571. "Thou art a Witch and a Sorcerer" held actionable, becauſe Witchcraft of any Sort was puniſhable.

If it took away the Perſon's Life, then it was Felony, and if it did other Harm, then the Pillory was Puniſhment. *Co. Ent.* 1. At Common Law it was reckoned a Species of Hereſy, and the Witch of *Eye* was burnt upon the Writ * *de Hæretico comburendo. Cro. Eliz.* 474, 480. *Jones* 97, 197. *Cro. Eliz.* 141, 261. *Rol. Abr.* 45. "Thou art a "Witch and didſt bewitch my Mother. *Yel.* 150. "Thou doſt work by Necromancy and doſt

* This Writ is now taken away by 29 Car. 2. c. 9. See Hale's Hiſt. Plac. Cor. 410. Note (b).

doſt work by the Devil," was held actionable, it begets Infamy and Reproach to the Party, and makes his Neighbours ſhun his Company.

Parker Chief Juſtice: If the Words had been ſpoke in the Words Mr. *G.* contends for as ludicrous only, and inſinuating that ſhe had an Influence over a Perſon, the Jury ought to have found the Defendant Not guilty; I am ſure I ſhould have directed ſo, for then the Words had not been proved as laid.

In Action for Words by Baron and Feme joint Damages muſt be given to both, unleſs ſpecial Damages laid to the Huſband.

Mr. *Gapper* took an Exception to the Verdict, that the Wife had taken Damages with her Huſband, whereas they ought to be to the Huſband only, and cited *Keb.* 791. where Judgment was ſtayed for that Reaſon, but it appeared that in this Caſe a ſpecial Damage was laid to the Huſband, which made it wrong.

Et per Parker Chief Juſtice: In Action of Battery by Baron and Feme, where the Caſe *per quod conſortiu' amiſit* has been put into the Declaration, and Damages given to both, Judgment has been arreſted, but in this Caſe they could not take the Damages otherwiſe.

The next Day Judgment was given for the Plaintiff by the whole Court.

V.

THE Bail moved to ſet aſide a Judgment obtained againſt them upon the Bail Bond, and upon a Reference to Mr. *Clark* the Caſe appeared to be, that *H.* an Attorney

was

was arreſted, and gave Bond for his Appearance, wherein the Defendants were his Sureties, to the Sheriff, and neglected to put in Bail, but entered a voluntary Appearance for his Sureties in Actions on the Bail Bond, without Arreſt or giving any Notice to them, and then let the Plaintiff take Judgment by Default, the Defendant being ignorant of the whole Proceedings.

Judgment not to be ſet aſide where Plaintiff in no Fault, and has done all he can.

Eyre and *J. Powys* Juſtices thought that the Judgment ought not to be ſet aſide becauſe the Plaintiff was in no Fault, and had done all that he could, and no Contrivance appeared between him and the Defendant in the original Action, but the Fraud was only in the latter, and the Bail might take their Remedy againſt him for appearing without Warrant. *L. Powys* Juſtice *ſemble encontre, abſente* Chief Juſtice.

Bellaſis v. *Mernham.*

Words laid only with an *Innuendo*, and not to be ſpoke of the Plaintiff.

IN Caſe for Words, and Verdict *pro quer'*, on *Non culp.* an Exception was taken in Arreſt of Judgment, that it was not alledged that the Words were ſpoken *de eodem quer'*, only laid he (*innuendo* the Plaintiff) is a &c. and *Cro. Jac.* 126 was cited in Point. *Et per Eyre* Juſtice: They do not ſignify the Plaintiff more than any other Man in the World, unleſs tied up by the Averment. *Jud. arreſt. quouſq' ulterius moveatur.*

Regina

Regina v. *Joſeland.*

A WRIT of *Excom. cap.* was returned into this Court, and the Excommunication was recited to be *in quadam cauſa ſubſtrac' decimarum vel al' Jur' ſeu Emolumentorum Eccleſiaſticor'*. Mr. *Lutwyche* moved to quaſh it for the Incertainty, being in the Disjunctive, ſo that this Court could not judge whether the Eccleſiaſtical Court had Juriſdiction in the Caſe, and relied upon the Authority of *Fowler's* Caſe, *Mich.* 12 *W.* 3. where it was adjudged ſufficient upon great Deliberation and Search of Precedents of *Significavits* in the Black Roll in Chancery.

Excom. cap. Subſtr' decimar' vel al' Jur' Eccl'. in the Disjunctive.

Parker Chief Juſtice doubted at firſt, upon an Opinion that many Precedents of *Significavits* might be in this Form, for that is the Courſe of thoſe Courts when a Citation is for ſeveral Matters, to put them into the disjunctive, becauſe otherwiſe they muſt pay Coſts for as many as they do not prove.

Trollop's Caſe 8 Rep. F. N. B. 64.

But *Eyre* Juſtice ſaid, that in *Fowler's* Caſe *Holt* Chief Juſtice looked over all the Precedents of *Significavits*, and in the Delivery of the Reſolution ſaid he could find but one in this Manner; that the Courts of Law take Notice that regularly the Eccleſiaſtical Courts have Juriſdiction of Tithes, but as to the Eccleſiaſtical Rights they differ, holding ſome Things to be ſo, which the Common Law ſays are not.

On the last Day of Term this Writ was quashed *per totam Curiam* on the Authority of the Judgment in *Rex* v. *Fowler*, *quod vide in* 12 *Mod.* 418.

Newball and *Seabrook*.

Sci' fac' v. *manucap. Recogn'* recited in the present Tense.

SCIRE fac. against Bail, and the Recognizance was cited *quod Defendentes se recogn' debere, &c. Et nisi fuerit tunc concedunt et uterq' eorum concedit, &c.* upon *Nul tiel record* pleaded, the Record was brought in, and moved in Arrest of Judgment, that the latter Clause being in the present Tense was Nonsense, and relating to an Act done at a Time past ought to be in the Pretertense; and a Case was cited *Mich.* 9 *W.* 3. *Whaley* v. *Reynolds*, where a *Sci' fac'* was quashed because the Declaration was recited in the present Tense *dicit*; but the Court held that the Writ would have been well without this Clause, and therefore the wrong inserting it should not vitiate it, though they inclined that it was well enough recited, and *Eyre* Justice put a Case of a Declaration upon a Bond by *concedit se teneri* at a Day past, and believed it would be well enough.

Clause of *Concedit* not necessary in *Sci. fac'*.

Judgment *pro quer'*.

Regina

Regina v. *Clark.*

THE Defendant was brought up by *Habeas Corpus* directed to the Sheriffs of *London* and *Middlesex*, and the Return was a Warrant of Commitment signed *W. Withers*, but he was no where alledged in the Return to be a Juſtice of Peace, ſo no Authority appeared; *ergo* the Return was quaſhed, and the Defendant diſcharged.

Return of *Habeas Corpus* quaſhed becauſe no Authority appeared in the Perſon ſigning the Warrant.

The Plaintiff brought Debt upon a Bond in *C. B.* and the Defendant pleaded Payment before the Day, the Plaintiff replied *Non ſolvit modo et forma*, and after Verdict and Judgment for the Plaintiff it was reverſed for Error in this Court, becauſe the Iſſue was immaterial; afterwards the Plaintiff brought another Action in this Court, and the Defendant obtained a Rule upon the late Act for Amendment of the Law, to bring Principal, Intereſt and Coſts into this Court; and now it was moved for a Direction to the Maſter what Coſts he ought to tax upon this Rule, whether thoſe upon the preſent Suit only, or for that in *C. B.* and of the Writs of Error here.

Conſtruction of the Clauſe in the Act 5 An. c. 16. for bringing Principal, Intereſt and Coſts into Court upon Bond, as to the Coſts.

The Clauſe of the Act upon which the Queſtion aroſe is, if at any Time, pending the Action upon any ſuch Bond with a Penalty, the Defendant ſhall bring into the Court where the Action ſhall be depending, all the principal Money and Intereſt due on ſuch

Clauſe of the Act.

Bond, and alſo all ſuch Coſts as have been expended in ſuch Suits in Law or Equity upon ſuch Bond, the ſaid Money ſo brought in ſhall be deemed and taken to be in full Satisfaction and Diſcharge of the ſaid Bond, and the Court may give Judgment to diſcharge, *&c.*

Mr. *Salkeld* argued, that the Defendant ought to pay no other Coſts than thoſe of the preſent Action, and for this he conſidered the Words and Intention of the Act. The Words *Coſts expended in a Suit or Suits in Law or Equity* could only mean ſuch Coſts as were juſtly and neceſſarily expended, for otherwiſe it would be in the Power of a Plaintiff to put a Defendant to as much Charge as his Malice, or the Ignorance of thoſe he employs, can occaſion, and all Statutes muſt be conſtrued *ſecund' jus*, and not ſo *ut qui lucrum capiat ex ſua culpa vel negligentia*, that no other Coſts could be intended but ſuch as the Plaintiff had a Right to, and might have a Remedy for.

In any Suit or Suits, that the plural was there added in caſe a Suit was begun in an inferior Court, and removed hither by *Habeas Corpus*, otherwiſe in Caſe the Defendant go to be relieved in Equity againſt his Bond.

That the Intention appeared by the Alteration it had made in that which was the Practice of the Court before the Act, and that was intirely for the Benefit of the Obligor. For,

1. Before

1. Before the Act he must have brought in the whole Penalty; now he may bring in Principal, Interest and Costs only. Practice before the Act.

2. Then he could not have this Rule after Plea pleaded, but by this Statute he may come at any Time pending the Action.

3. Before the Act the Court could not force the Plaintiff to take the Money, but if the Action abated by the Death of the Parties or other Accident, a new Action might be brought in another Court, and yet the Defendant's Money remained here, but by this Act the Court is enabled to give Judgment to discharge the Defendant.

That it was not the Intent of the Act, to make a Bond a better Security than any other, but if the contrary Exposition prevailed, it would be better than a Judgment.

That the Intent of the Statute in this Matter might further be explained by the preceding Clause, which enables the Defendant to plead the Payment of Principal and Interest after the Day in the Condition, for upon that Clause if the Obligor had tendered Principal and Interest before this Action brought, he might have pleaded it in Bar, and the Defendant could not have gone back to the Costs of the Judgment reversed.

Mr. *Whitacre contra* insisted, that by the Statute this Court was enabled to do that which

a Court of Equity would have done before, and they would have given the Plaintiff all the Coſts of the firſt Suit and Reverſal for the Year ſuch as the Defendant put him to by not paying the Money without Suit; as in Juſtice he ought to have done, and the Words of the Statute were large enough to comprehend this, and therefore the Court would continue it according to Equity, that upon the preceding Clauſe the Defendant could not plead a Tender of Principal and Intereſt, for that is not Payment in Conſcience, and this Court is to take it upon the Statute as a Court of Equity would have done before.

Parker Chief Juſtice: Both Sides ſeem to argue this Caſe very much in general. Suppoſe the Obligee had brought a Bill in Chancery upon this Bond, and been diſmiſſed with Coſts, would ſuch Obligor upon ſuch a Rule have been obliged to pay thoſe Coſts? If that be too hard, then we are got out of the Generality; put the Caſe then that the Plaintiff had declared wrong, and the Court *ex officio* had taken Notice of the Miſtake, and given Judgment againſt him, ſhould Defendant have been obliged to pay thoſe Coſts? Surely this is too hard.

The Queſtion then ſeems to be, how far thoſe Coſts have been occaſioned by the Defendant's Fault.

The Defendant's Plea was wrong, but not ſo plainly wrong but that it might be a very innocent

innocent Miſtake; for a learned Gentleman has ſince undertaken to maintain another of the ſame Sort, which is not yet determined; but though the Plea was wrong, the Plaintiff might have a right Judgment on it by demurring, but he choſe to go to iſſue, and ſo had got a wrong Judgment by his own Election.

Tendering of Principal and Intereſt after the Day, would certainly be a Diſcharge in Conſcience upon this Act, and if the other would not take it, Chancery would give the Defendant his Coſts. *Underhill* and *Mathews*, 2 G. Regis *per tot' Cur'*.

If before this Action brought the Defendant might have tendered Principal and Intereſt, and the Plaintiff ought to have accepted it without any Coſts of the former Suit, it would be ſtrange that he ſhould intitle himſelf to more by bringing his Action.

J. Powys Juſtice: The Defendant having pleaded a Plea in the firſt Suit, which he now confeſſes to be falſe, ought not to come here and claim Favour.

Though the Plaintiff might have been Wrong in his Proceedings after that Plea, yet he was right in his Arreſt and Declaration, and the Defendant was in the Wrong in not paying his juſt Debt upon them, therefore he was in the firſt Fault, and it ſeems

that the Defendant ought not to loſe thoſe at leaſt.

Adjournatur. L. Powys ſemble accord, et le Chief Juſtice *Eyre nil dixit.*

Regina v. *Kriott.*

Order of Baſtardy, Appeal lies not from Corporation to County Seſſions. Caſe of Set. and Rem. 58.

AN Order of Baſtardy was made at the Corporation Seſſions of *Plemton Morris* in *Devonſhire*, and Party appealed to the Seſſions of the County who reverſed the former Order. Sir *Peter King* moved to quaſh the Order of Reverſal, the County Seſſions having no Juriſdiction, which the Court held clearly that no ſuch Appeal could lie, for that the Statute of 3 *Car.* 1. *c.* 5. had given Corporation Juſtices the ſame Power in and out of Seſſions, as the Juſtices of the County had by the Statute of Queen *Elizabeth* in and out of Seſſions, but Order of Reverſal, and an original Order made afterwards by the County Seſſions to charge another Perſon, were both quaſhed.

Per Parker Chief Juſtice: The Statute of 3 *Car.* 1. expounded to give the Juſtices of Seſſions an original Juriſdiction, though the Intention does not ſeem to have been ſo large.

Regina

Regina v. *Bedford*.

THE Defendant having been found guilty of writing, printing and publiſhing a ſcandalous and ſeditious Libel, intituled, *The Hereditary Rights*, *&c.* the Court gave Judgment that he ſhould be fined 1000 Marks, impriſoned for three Years without Bail or Mainprize, and upon his Delivery find four Sureties in 5000 *l.* for his good Behaviour during Life, and that upon the next *Friday* he was to be brought up and ſhewn to all the Courts ſitting in *Weſtminſter-Hall*, with a Paper in his Hat expreſſing the Crime and the Judgment, and was committed to the Marſhal.

Information for a Libel, Part of the Judgment remitted.

Upon *Friday* Mr. *Kettleby*, Defendant's Counſel, moved the Court upon a Paper which was delivered in and read; it was under the Privy Seal ſigned by her Majeſty, and directed to the Lord Chief Juſtice, the Juſtices of the Court, the Sheriffs of *London* and *Middleſex*, and Marſhal of the *Queen's Bench*, and imported a Recital of the Conviction and Judgment, and that he had humbly repreſented to her Majeſty by Petition, that he was a Clergyman of the Church of *England*, and prayed that the ignominious Part of the Sentence might be remitted; Theſe are therefore to require you and every of you not to put in Execution that Part of the Judgment, which is that he be brought to the Courts in *Weſtminſter-Hall*

Hall, &c. and for your ſo doing this ſhall be your and every of your ſufficient Warrant.

The Court immediately made a Rule to diſcharge the Marſhal of his Attendance with him that Day, and ſaid they would conſider how the Judgment ought to be entered up.

Danimes v. *Birch.*

IN an Action of —— the Defendant prayed *Oyer* of a Deed produced, and the Plaintiff's Attorney gave him a wrong Copy with the Words *peremptable* and Intereſt, inſtead of Principal and Intereſt, according to which the Defendant ſet it forth and demurred; in another Term (after it was made a *Concilium*) the Plaintiff moved to amend it by the original Deed which was right. The Court doubted.

But *Parker* Chief Juſtice *ſemble*, That it might be amended, for the *Oyer* is ſuppoſed to be entered from the original Deed, and the Copy is the Defendant's, for he pays for it, though the Plaintiff's Attorney might write it over for him.

A Cauſe was cited *Doyly* v. *Brown John*, *Hil.* 8 *Annæ*, where an Avowry was amended after Entry by the Draft under Counſel's Hand, though the Copy delivered to the Plaintiff in Replevin was wrong.

38 *H.* 6.

38 *H.* 6. 2. Where after the Term wherein *Oyer* was given, *Littleton* pleaded a Sham Plea, which made the other ſide bring the Deed in again, and then took Advantage of the Variance.

Adjournatur.

Ryder v. *Brodherſt*, *ex rel' Mag'ri P. W.*

THE Queſtion was whether the Record was well removed by the Writ of Error; the Writ was directed *Thomæ D'no Trevor* to ſend up the Record and Proceſs *loquelæ quæ fuit coram vobis et ſociis veſtris*, &c. and the Record was *Pl'ita irrotulat' apud Weſtminſter' coram Tho. Trevor milite et ſoc' ſuis*, &c. ſo that the Obligation was, that it did not appear that *Tho. Trevor milit'* was the ſame Perſon as *Tho. D'nus Trevor*, and conſequently that the Record removed was not the ſame deſcribed in the Writ. See 10 Mod. 285. Antea

Mr. *Forteſcue pro Def' in Errore:* A Writ of Error is a ſpecial Commiſſion to examine the Errors of the particular Record deſcribed, therefore the Words are ſtrictly to be purſued, and cannot be aſſiſted by Intendment, nor can there be any Room for it in this Caſe. Titles are given for Diſtinction of Perſons, and the ſame Name with different Titles ſhews a different Perſon; perhaps if the Writ had been directed to *Thomas* Lord *Trevor* Knight, it had been ſufficient. But *Thomas* Lord *Trevor*

vor cannot be the ſame Perſon as *Thomas Trevor* Knight, for firſt, Knight and Lord are different Titles. Secondly, They may diſtinctly ſubſiſt in the ſame Perſon, and the Lordſhip though higher does not drown the other; a Lord by Birth may receive Knighthood, and if under Age at the Time, it ſhall put him out of Ward. *Seld. Tit. of Hon.* 786, 787. The Story of the Earl of *Carliſle*, who being convicted of High Treaſon was before Judgment ſolemnly degraded from the Order of Knighthood. Now if *Thomas Trevor mil'*, before whom *Pl'ita irrotulata fuer'*, had been created a Lord, yet he would ſtill remain a Knight, and the Addition of Knight would be proper, but it does not appear that the Lord *Trevor* to whom the Writ is directed is a Knight, and conſequently cannot be taken *Tho.* Lord *Trevor*, and *Tho. Trevor* Knight are the ſame Perſon.

For Authorities he cited *Hob.* 129. Recognizance entered into before the Mayor of *Coventry* by *Geo. Griſly*, Eſquire, certified into Chancery, and before any *Capias* iſſued thereon he was made a Baronet, but afterwards a *Capias* went out as againſt *Geo. Griſly*, Eſquire, and was held wrong, and the Conuſee obliged to purchaſe a new *Capias* in this Form, *Cap' corpus G. G. qui per nomen G. G. Ar' recognoſcitur. Hob.* 137. Judgment *Quare impedit* by *Geo. Sherley*, Baronet, Writ of Error was *quia in Record, &c. int' Geo. Sherley Mil' & Bart.* and the Record was held not well removed.

Bro.

Bro. Faiter de Record 11. *accetiam per A. B. Mil'* pleaded Diſability *per* Utlawry, *Et Record fuit certifie in quel A. B. Ar' fuit utlagat' Ideo il faile de Record. Cro. Jac.* 341. Error in Parliament upon a Judgment affirmed in *B. R.* directed to the then Chief Juſtice, *quia in Recordo loquela quæ fuit int' A. et B. capt. coram nuper Thoma Fleming nuper Cap. juſtic' n'ro ad Pl'ita et Jo'he Dodderidge, Mil' uno juſtic' n'ror' ad Pl'ita coram nobis tenend' aſſignat' juſtic' n'ris ad aſſiſas, &c.* *Bro.* not warranted by the Year Book in 38 H. 6. 1.

The Record was *Coram Thom' Fleming Mil' Cap' jud' Pl'ita cor' nobis tenend' aſſignat'*, and the Record was held not removed becauſe *Tho' T. C. J. ad Pl'ita* was not the ſame Perſon which *Tho. T. C. J. ad Pl'ita cor' nobis tenend' aſſignat'*.

Dyer 299. *b. pl.* (35.) In Debt *ſur* Leaſe for Years, it was ſuppoſed that *Tho. Weſt Mil' D'nus le Ware fuit ſeiſitus* and demiſed. A Traverſe was taken, *abſque hoc, quod S. W. mil' D'nus le Ware demiſit*, and it appeared on Evidence to the Jury, that he was not a Lord at the Time of the Demiſe, his Father being then alive, and the Iſſue was found againſt the Plaintiff.

Serjeant *Cheſhire contra:* That if there was not apparent Variance between the Writ and Record removed, ſo that it was impoſſible they ſhould be the ſame, it was well, and there was no ſuch Variance here, that though there was a Difference of Names or Titles, yet a *pred'* or any Thing tantamount thereto would help it, and for this cited 22 *H.* 6. 48. *pl.* 3.

pl. 3. *Burgeſs* brought Debt *ſur* Obligation, the Defendant pleaded an Acquittance ſigned *Burgeles*. Objected the Perſons are different, he ought to have pleaded that the Plaintiff made it *per nomen Burgeles*. *Paſton*. When the Defendant ſays that the Plaintiff *per ſon fait (que cy eſt) luy* acquit, it is ſufficient in my Opinion, but the Defendant's Counſel *de gre et par ouſter* its Ambiguities pleaded *per nomen* to avoid any Occaſion of Diſpute, not out of Neceſſity. In this Caſe there is a plain Intimation to the Court, that the Record ſent for and that returned is the ſame, for though the Titles of the Chief Juſtice differ in the Writ and the Record, yet in as much as the ſame Perſon may have different Titles at different Times, and the Alteration of the Title make no Alteration of the Office, as *per* 4th Clauſe of 1 *Ed.* 6. therefore the Court cannot intend that there were two *Trevors* who were Chief Juſtices, but that the *Trevor* who returns the Writ is the ſame *Trevor coram quo Pl'ita irrotulat'*, though ſince that Time his Title is altered, *Sid.* 64. the Court will not intend another Juſtice than he who returns the Writ. That Caſe was a Writ directed to the Juſtice of *Cheſter* or his Deputy, and it was returned *Jo. Bradſhaw* Chief Juſtice, and held well; as to the Caſe in *Dyer* it was not like this, depending upon a particular Reaſon, *viz.* that the Title of the Perſon there was made Part of the Iſſue, which, whether proper or not, was not then to be determined, but the Judge of *Niſi prius* was to direct the Jury according to the Iſſue. *N. B.* The Serjeant's Anſwer to the Caſe in *Dyer* ſeems good, and warranted by

by the Books, for unleſs the Dignity itſelf be in Iſſue, there is no Reaſon why either Judge or Jury ſhould take Notice of it, and it is wrong to make a Title Part of a collateral Iſſue in Covenant; *Ralph* Lord *Eure* made Title to the Reverſion of a Term by Bargain and Sale from *Allen*, who by Indenture by the Name of *Allen* on the one Part, and the ſaid Lord *Eure* by the Name of *Ralph Eure*, Knight, Lord *Eure*, on the other Part, bargained and ſold the Reverſion to the ſaid *Ralph* Lord *Eure* the Plaintiff. The Defendant pleaded that at the Time of the Bargain and Sale the ſaid Lord *Eure* was not a Knight, nor known by the Name of *Ralph Eure*, Knight, Lord *Eure*, and the Court rejected the Plea upon the Demurrer, for if he was not a Knight, the Conveyance was good to him, and the Perſon ſufficiently deſcribed. *Cro. Jac.* 204. S. C. *Bulſtr.* 21. In Ejectment the Demiſe was alledged to be made by *George Sutton D'nus Leaington*, and upon the Trial *Maynard* objected that the Demiſe was not proved, for that *Sutton* was not a Peer of the Realm, but only an *Iriſh* Lord, and cited the Caſe of *Dyer*. But the Court ſaid that in this Caſe the Plea was Not guilty, and the Title was made Part of the Iſſue, and it is ſufficient that it be the ſame Perſon that demiſed, though miſnamed. *Allen* 58 59. *Barnard* v. *Bonner*.

As to the other Caſes, *viz. Hob.* 129, *&c.* they are Proceſs which muſt agree with the Original, otherwiſe they cannot appear to be grounded thereon, therefore an *Al' dict'* or *per nomen* was neceſſary.

In

In the Caſe of *Hob.* 327. the Difference was between the Party's Title in the Record and the Writ, and the Court into which the Record is ſent, being intirely ignorant of what has been done below, cannot affirm that Record between *A.* and *B. mil'* is the ſame as a Record between *A.* and *B. mil'* and *Bart.* but it is not required that they ſhould neceſſarily appear to be the ſame Perſons for a Writ to remove a Record *Int' A. and B. De Cuddington, Loyd* v. *Rogers, Paſ.* 10 *Anne, B. R.*

Cro. Jac. 341. is a Miſtake in Title of the Office, there is no ſuch Officer as *Cap. juſtic' ad Pl'ita.*

Here though there is a Difference, it may be the ſame Perſon, Writ to him by the Title of Lord, to ſend a Record of a *Loquela que fuit coram vobis*, he returns a Record agreeing in every other Point of the Deſcription but his own Title; his Return muſt be taken to be true unleſs it be apparently falſe, but that it is not, becauſe the Return might be before him though he was but a Knight, and he could not return, but there was no ſuch Record before him; to ſay the Return is by another Chief Juſtice before whom the Plea was not inrolled, is to deny what is affirmed by the Return.

Cart. del Niſi prius; demiſe del Roy. Vide Bro. Record 17. Dyer 162. Vet' Int' 85, 86.

Poph. 203. was *coram Fran'co Hewey arm'*, and the *Niſi prius* was certified to be tried *Coram Fran'co Hewey mil'*, and Exception was taken that it was not the ſame Perſon. *Mes' per Doderidge* it is very conſiſtent, he might be an

an Eſquire at the Time of Trial, and a Knight when Record certified; and to this *Jones* and *Whitlock* agreed. *Quære* whether the Reaſoning of this Caſe do not determine that at Bar to be good?

Muſton and *Yeatman*, *ex rel' Mag'ri P. W.*

TRESPASS, Defendant pleaded that *J. F.* was ſeiſed of a certain Cloſe, and that he *et omnes illi quorum ſtatu'*, *&c.* have Time out of Mind had a Way through the *locus in quo*, *&c.* and juſtifies under this Right. Iſſue thereon, and found for the Plaintiff. Mr. *Foſter* moved in Arreſt of Judgment, that the Plea was ill, becauſe the Seiſin alledged was uncertain whether in Fee or for Life only, then no Foundation for which can only be annexed to an Eſtate that is to be for ever, that the Word *Seiſitus* without more only imported a Freehold, he cited 24 *Ed.* 3. 15. 2 *Ed.* 4. 52. 18 *Ed.* 4. 3. 21 *H.* 7. 3. 4 *Rep.* 31. 6 *Rep.* 60. That this being in the Caſe of a Deſcription was not helped by Verdict, he cited *Bradwick* v. *Wilſon*, *Trin.* 11 *Annæ*, *B. R.* 10 Mod. 228, 300.

The Caſe was now argued.

Sir *Peter King pro Def'te*, That the Word *Seiſitus* does not import an Eſtate for Life only, but an Eſtate for Life at leaſt, *Co. Litt.* 200. *b.* as *per Lit. ſect.* 293. the Word *Feoda*

ſhall be intended of the higheſt Fee, *viz.* Fee-ſimple. So *a pari* the Word *Seiſitus* ſhall be intended of a Seiſin in Fee-ſimple, which is the higheſt Seiſin, *additio probat minoritatem*, but admitting the Expreſſion at firſt too general, the Verdict has determined it to be a Seiſin in Fee, becauſe if that had not been proved, we could not have had a Verdict.

Hutton 54. Sir *T. Jones* 232. *Raym.* 482. In Debt for Rent, Leſſee for 90 Years makes a Leaſe for 30 Years; Plaintiff made Title by a Bargain and Sale of the 90 Years Term, but alledged no Attornment.

Upon *Nil debet* Verdict *pro quer'*, and upon Motion in Arreſt of Judgment, which ſhould have been intended to have been proved, becauſe without, the Jury could not have found for the Plaintiff, *Lev.* 308. Replication Avowry that *J. S.* was ſeiſed of the Rent, and made by Bargain and Sale from him, without alledging any Conſideration. Iſſue on *Non conceſſit* found for the Avowant, and held upon Motion in Arreſt of Judgment, that want of alledging a Conſideration was aided, becauſe unleſs it had been proved, the Jury could not have found the Bargain and Sale.

Mr. *Forteſcue cont'*: Every Plea to be conſtrued moſt ſtrongly againſt the Pleader, therefore by *Seiſit'* generally, only a Freehold ſhall be intended, but if it might import either Freehold or Fee, it would be ill for the Uncertainty; that where it is not neceſſary to ſhew Title and an ill one is ſhewn, perhaps it may

may be aided by Verdict, otherwiſe if it were neceſſary, 2 *Lev.* 148, 193. that a faulty Preſcription not aided by Verdict be relied on. *Wilſon* and *Bradwick.*

Quære whether not aided by Verdict, for though a faulty Preſcription may not be aided by Verdict, as was the Caſe of *Wilſon* and *Bradwick*, yet an imperfect Conveyance or Title to a Preſcription, as this is, may as well be aided as an imperfect Conveyance or Title to Land; the Reaſon of the Rule for aiding by Verdict ſeems to be, that wherever the Proof of the Iſſue ſeems to depend neceſſarily upon the Proof of another Fact imperfectly alledged in the Pleadings, ſuch imperfect Allegation is aided by Verdict, becauſe the Subſtance of ſuch Allegation is taken to be proved by proving the Iſſue, and unleſs it were, the Verdict would not be true.

De Term' Stæ. Trin. 13 Annæ.

Regina v. *Aimwell.*

Indictment *Fabrii Ferrarii.*

THE Defendant was indicted upon the *Stat.* 5 *Eliz. c.* 4. for exercising the Trade *Fabrii Ferrarii*, *Anglicè* a Black Smith, not being an Apprentice.

Quashed because laid in *English*, for *Fabrii Ferrarii* is Nonsense.

Hatch v. *Blisset.*

Protection of a Witness going and coming from Court.

THE Plaintiff being a Butcher brought an Action against one *Traberne* for Meat delivered in to his Family, which being carried down to *Winchester* Assizes, *Traberne* brought the now Defendant *Blisset* an old Woman who lived in the House, to swear that the Meat was sent in upon her Credit, and that she was the Debtor. The Trial ended on *Friday* about Four in the Afternoon, and on *Saturday* about Seven as she was going home in a Coach to *Portsmouth*, the Plaintiff arrested her by a *Latitat* for the same Cause of Action;

Action; and now it was moved upon the Protection of a Witneſs in going and returning from the Court, that an Attachment might iſſue againſt the Plaintiff and Bailiff, and it was proved that the *Latitat* was not delivered to the Sheriff till the Day of the Arreſt. On the other Side it was inſiſted, though a Witneſs ſhould have free Liberty of going and returning, yet that did not extend to as long Time as ſhe thought proper to take; that *Portſmouth* was but twenty Miles from *Wincheſter*, and the Defendant might have been at home much ſooner; that ſhe was an old Woman who lived in a Garret who was never to be met with, but was brought down merely to ſwear them out of their Debt.

But the Court ſaid that the Witneſs muſt have a reaſonable Time to return in, and thought one Day the leaſt that could be allowed, and that they could not try all the Niceties of Delays that might poſſibly happen; and whereas it was ſaid *per* Serjeant *Pratt*, at the Bar, that in *Middleſex*, if a Witneſs returning from the Sitting loiters by the Way to drink a Pot, his Protection is determined. As to the latter Reaſon the Court ſaid, that concluded againſt the Plaintiff by ſhewing a Deſign.

A Rule was pronounced for an Attachment, but afterwards the Parties agreed.

Regina v. *Kirby.*

Bail in High Treaſon.

THE Defendant, being arraigned on an Indictment for Treaſon, did in *Hilary* Term plead the *Queen*'s general Pardon under the Seal of the Iſland of *Antigua*, and averred himſelf to be out of all the Exceptions of the ſaid Pardon, and pleaded over to the Treaſon Not guilty.

He was now brought by *Habeas corpus* in order to be bailed, and the Keeper of *Newgate* returned a Warrant of Commitment by the Secretary of State for the Murder of Colonel *Parke*, and an Affidavit was read of the ill State of the Defendant's Health occaſioned by his Confinement. Mr. Attorney general acquainted the Court that he intended to reply, that the Defendant was in Cuſtody in *Antigua* for this Fact at the Time of the Pardon granted, which was one of the Exceptions, but was not yet able to do it by Reaſon the Warrant of Commitment was not yet ſent from *Antigua*, and *Barrat* the Solicitor and the Gaoler there would not part with it.

The Court ſaid that by Reaſon of the ill State of his Health, the Length of Time that he had been in Cuſtody, and the Delay of the Proſecution, and that it did not appear when it was likely to proceed, they would admit him to bail, and took a Recognizance of his Appearance upon the Indictment on the laſt Day of Term, *Pars ipſa* in 4000*l.* and the Sureties

Sureties in 200*l.* a-piece, *et corp' pro corpore.*

Parker Chief Juſtice: There is no Caſe where you can move to diſcharge a Rule without giving Notice of the Motion, except a Rule of Reference to the Maſter for want of proſecuting it. Notice muſt be of Motion to diſcharge a Rule.

Strafford v. *Forcer, Adminiſtrator, &c.*

IN *Aſſumpſit* againſt an Adminiſtrator laid ten Years ago. Mr. *Darnel* moved for Leave to plead double, *viz.* the Statute of Limitation and ſeveral Judgments to cover Aſſets. Double Plea by Adminiſtrator. 10 Mod. 311.

Parker Chief Juſtice: By my Conſent you ſhall plead ſo, provided you will bring an Affidavit that the Judgments are *bona fide*, but we will not aſſiſt you to fence by fraudulent Judgments.

Regina v. *Gill.*

IN an Information againſt the Defendant to ſhew *Quo warranto* he claimed the Office of Portgreve of *Hexiton*; the Defendant made Title under the Conſtitution of the Borough, and the Iſſues were, *Venire de novo* awarded. See Antea

1. That the Perſons returned by the Bailiff of the Borough upon the Jury of the Court Leet, and no others, ought to be ſworn upon the Jury there.

2. That the Portgreve ought to be choſen by the Perſons ſo returned, and ſeven of the Jury, out of the Inhabitants and Freeholders that had ſerved the Office of Ale-Taſters, to ſerve the Office of Portgreve for one Year next enſuing.

3. That *Talis perſona ſic ut præfertur electus, &c.* ſhould be ſworn and admitted before the Steward faithfully to execute the Office for a Year, *et ulterius* till another ſhould be choſen.

The Cauſe went down to Trial, and the Jury found the Iſſues ſeverally.

1. That the Perſon returned by the Bailiff upon the Leet Jury, and no others, are ſworn upon this Jury.

2. That the Jury ſo returned and ſworn *non debuer'* to chooſe one of the Inhabitants and Freeholders of the Borough, that had ſerved the Office of Ale-Taſter, to ſerve the Office of Portgreve for one Year next enſuing.

3. That *Talis perſona ſic ut præfertur electus, &c.* ought to be ſworn before the Steward faithfully to execute the Office for a Year, *et ulterius* till another ſhould be choſen.

Mr.

Mr. *Salkeld* insisted that Judgment ought to be given for the *Queen*, upon this finding, for the Defendant, having set forth the Right to be, that the Portgreve should be chosen out of the Inhabitants Freeholders that have been Ale-Tasters, that the Right was falsifyed by the second Finding; that a *Quo warrento* was in Nature of a *Quo jure*, and therefore the Defendant must set forth a perfect Right, and conclude *et eo warranto clamat*. This he cannot do, if he either enlarges or abridges the Constitution of the Borough, which last he has done here by confining the Persons capable to be Ale-Tasters, and therefore his Plea does not conclude *per Necesse*, for possibly an Inhabitant Freeholder not an Ale-Taster might have a Majority of Voices, and be rejected for Incapacity because not an Ale-Taster.

Plea in *Quo warranto* of the Constitution of a Town equally ill, if it enlarges or abridges that Constitution.

Sir *Peter King contra*, would have made it a Finding for the Defendant, for that the second Verdict was only a Negation, that to make a Man capable of being chosen Portgreve he should have been an Ale-Taster, and it was admitted by the Replication, that the Defendant had all the three Qualifications, and if he had one more than was required it would do no hurt.

But that if the *sic ut præfertur electus* should go to the whole foregoing Manner of Election, and that be taken to be denied by the second Finding, then there will be a Repugnancy, and consequently no Finding at all as to one, and then a new *Venire* must go for the whole.

2 *Rol.*

2 *Rol. Abr.* 722. *pl.* 13. 3 *Leon.* 33. *Co. Litt.* 227.

The Court held that the negative Particle in the ſecond Finding went to the whole, and by that no Inhabitant Freeholder who had been an Ale-Taſter could be choſen, and that the third was inconſiſtent with it in ſaying that ſuch Perſon ſo elected ought to be ſworn to ſerve for a Year, *&c.* ſo that upon this Verdict the Defendant either might or might not have a Right, and therefore they could not give Judgment upon it one way or other.

A *Venire facias de novo* was awarded.

Fothergill v. *Jackſon.*

Words of a Tradeſman in his Way of Buſineſs.

CASE, for theſe Words ſpoken of a Tradeſman upon a *Colloq*[1] of his Buſineſs and Credit, "He is forced to keep *Dunkirk (quandam Cameram in Domo ipſius quer'* *Innuendo)* and *E. Carter* has marked all his Goods, *(bona ipſius quer' Innuendo)* and he *(dictum quer' Innuendo)* dare not look out with this Head."

There was a Judgment by Default, and it was objected in Arreſt of Judgment that the firſt Words of keeping *Dunkirk* were in themſelves uncertain, and the latter of his Goods, and he dare not, *&c.* might more properly refer to *E. Carter*, and there was nothing but the *Innuendo* to confine them to the Plaintiff. But the Court held that the Words being laid to be

be ſpoken *de eodem quer'* it was well enough, and the laſt Words being ſpoke of a Tradeſman in his Way of Buſineſs were certainly actionable.

And Judgment was given for the Plaintiff.

Watkins v. *Gunter.*

Error of Fine.

ERROR was brought of a Fine levied in the Grand Seſſions of *Wales*, and the Error aſſigned was, that the Conuſor died between the Caption before the Commiſſioners and the Return of the Writ of Covenant; the Defendant replied *In nullo eſt erratum.*

Mr. *Brathwaite* inſiſted, that by the Death of the Conuſor before the Return the Writ was actually abated, and not like the Caſe in *Dyer* 246. which was Marriage of a Feme ſole Conuſor, after the Acknowledgment and before the Return, for that made it only abateable, which if not pleaded cannot be taken Advantage of afterwards. *Cro. El.* 468. *Raym.* 471. *T. Jones* 480. 2 *Sid.* 22.

Serjeant *Lloyd contra*, That the Fine *et licentia concordandi* being paid, and ſo indorſed on the Back of the Writ before the Death, was a ſufficient Authority for the Court to proceed on the Fine, and ſo were the Books. *Dyer* 320. *Hob.* 330. 5 *Co.* 39. 3 *Cro.* 469.

J. Powys

Err' brev. Conuſor died before the Return of Covenant tho' Queen's Silver actually paid.

Mod' law' Fines 2 Inſt. 517.

J. Powis Juſtice: Thoſe Caſes are where the Fine *pro Licentia concordandi* was paid, after the Return of the Writ of Covenant there can be no Fine nor *Licentia concordandi*, which is this Caſe.

And of this Opinion ſeemed the whole Court.

Serjeant *Loyd* took an Exception to the Writ of Error, that it was *Anna Dei Gratiâ, &c. Juſtic' ſuis Magnæ Seſſion', &c.* whereas it ſhould be *noſtris*, for the *Queen* was ſpeaking in her Writ in the firſt Perſon, but *Cur' ſemble* it was well enough, and many Precedents are in that Form.

Sed Adjournatur.

V.

Requiſites in Affidavit to put off a Trial for want of a material Witneſs.

PER Parker Chief Juſtice: In an Affidavit to put off a Trial for want of a material Witneſs, two things are requiſite.

1. To ſhew that he cannot now be had. 2. That there is a Probability he may be had in ſome reaſonable Time, for a perpetual Reaſon is no Reaſon.

Gill

Gill v. *Gill.*

IN Debt upon a Bond conditioned for the Performance of the Award of *A.* and *B.* *et ſi &c.* then of the Umpirage of *&c.* the Plaintiff on Umpirage aſſigned a Breach, Defendant demurred.

Debt upon Bond for Performance and Award.

Mr. *Forteſcue* for the Defendant objected, that the Umpirage was void, not having made a final End of all Matters in Difference, for a Sum of Money was awarded to be paid at a Day three Months after the Award made, and then General Releaſes to be given, but Suits were not ordered to ceaſe, ſo that they might proceed in the mean Time. *Lev.* 358. *Mich.* 2 *Anne*, *Squire* v. *Grevett.*

The like Exception was taken to the Releaſes, as in the Caſe of * *Barnardiſton* and *Foulgier*, *Hil. ult'.* that they were to be made of all Matters to the Time of the Award made.

* Ante 125.

Parker Chief Juſtice: The Caſe of *Barnardiſton* and *Foulgier* over-rules the laſt Exception by the Reſolution of the whole Court, and the Reaſon of it alters the firſt Exception, for it doth not appear that this is a Debt for which he could by Law ſue in the mean Time, and poſſibly it might not come due till the Time they have ordered it to be paid, and then it would certainly be well; you ſhould have ſhewn it to be otherwiſe before you could come

And muſt make a final End, but it need not be immediate.

Award of subsequent Payments good.

come at the Question whether a final End must be immediate or not. I think it need not, but it is sufficient if it settles all Matters, if it ought to be immediate, that will overthrow a Multitude of Cases, for the Length of Time will not be material, but it will be ill though the Thing be to be done the next Day.

Eyre Justice: Nothing is more common than to award subsequent Payments.

J. Powys accord L. Powys, iffint fuit judgment done pur le Plaintiff.

Myles vid. v. *Williams et ux.*

12 *Annæ.*

Resolution of the Court that the Debts of the Wife while sole are discharged by the Bankruptcy of the Husband, so that Debts due to the Wife while sole, though unrecovered, are assignable by Commissioners of Commission of Bankrupcy against the Husband, *per* Statute 4 & 5 *Annæ*, and that the Plea upon the Act must conclude to the Country. Wil. Rep. 249. 10 Mod. 160, 243. Post.

PARKER Chief Justice delivered the Resolution of the Court, and after stating the Record at large went on as follows.

The two great Questions which have been made in this Case are these.

1. Whether this being a Debt upon a Bond made by the Wife while sole, be such a Debt as shall be discharged by the Bankruptcy of the

the Husband, by Virtue of the Statute 4 *An.* c. 17. mentioned in that Plea?

2. Whether the Defendants have well considered this Plea or not, being to the Judgment of the Court, and not to the Country?

And as to the first of these we are all of Opinion, that it is a Debt within the Act, the Words of the Clause upon which it depends are * "that the Bankrupt shall be dis- * Sect. 7.
"charged from all Debts by him due and owing at the Time he became Bankrupt, and "then in case he be sued for any such Debt, "the Act directs that he shall and may plead "in general, that the Cause of Action did "accrue before he became Bankrupt." Upon these Words the immediate Question is,

Whether this be a Debt due and owing by the Bankrupt Husband at the Time he became Bankrupt.

It was said, and I think admitted at the Bar, that a Debt due by the Wife and one due to the Wife *dum sola*, must fall under the same Consideration.

This is very reasonable, and therefore I shall first consider how far a Debt due to the Wife would be within this Act to be assigned by the Commissioners, and in order to understand this it is necessary to go back to the former Acts.

Statute

Intent of the Statute againſt Bankrupts.

Statute 13 *Eliz. c.* 7. enacts, that the Commiſſioners ſhall take Order with the Bankrupt's Body, Lands and Tenements (as well Freehold as Copyhold), Goods, Chattels, Debts, *&c.* and ſell the ſame, *&c.*

Then comes the Statute 1 *Jac. c.* 15. reciting, that the Authority given to the Commiſſioners by the former Act was not full and perfect, and for further Remedy gives them * "Power to grant and aſſign all Debts due "or to be due, and that for the Benefit of "the Bankrupt, and the ſame to be recovered "in the Name of the Aſſignees." Now the Intention of all theſe Laws I take to have been, that the Bankrupt having been guilty of a Fraud ſhould not be truſted with the Management of his Eſtate, but it ſhould be put into other Hands for the Safety of his Creditors, and that the Bankrupt ſhould have no further Intermeddling with it.

* Sect. 12.

So that upon this Intention all thoſe Effects, all thoſe Debts, which he could take and turn into Money, thoſe the Aſſignees of the Commiſſioners were deſigned to have in as full Manner, either by Action or otherwiſe, and that in their own Name.

The beſt Way of conſtruing Statutes is by the Rule of the Common Law.

The beſt Rule of conſtruing Acts of Parliament is by the Common Law, and the Courſe which that obſerved in the like Caſes before the Act.

So it is upon the Statute *de Donis* that enacts, that Tenant in Tail *non habeat poteſtatem*

talem alienandi terr', to prevent its coming to the Iſſue, and that a Fine levied by him *ſit ipſo Jure nullus.*

The Effect of this Statute is a Diſability to alien to the Prejudice of others, therefore the Law ranks him with Biſhops and other eccleſiaſtical Perſons, and Huſbands, who were by the Common Law diſabled to alien to the Prejudice of their Succeſſors and their Wives, and therefore though the Words be, Tenant in Tail ſhall not have Power to alien, and his Fine ſhall be void; yet it was conſtrued that this Fine was not void, but made a Diſcontinuance, and put the Iſſue to his *Formedon*, and that other Alienations either put the Iſſue to his Action, or allowed his Entry, juſt as the Law before ſtood in Relation to Biſhops.

Choſe in Action may be aſſigned to the King, and he or his Grantee may have an Action for it in their own Names.

At Common Law it is a general Rule, that no Body can have an Action but the Creditor or his Repreſentative when dead, but there are two Caſes wherein this Rule fails, *viz.* in Caſe of Forfeiture and Aſſignment to the King; for though a *Choſe in Action* cannot be aſſigned to a common Perſon, yet it may to the King, and in both theſe Caſes the King or his Grantee or Aſſignee may have an Action for theſe Debts in their own Name, 21 *H.* 7. 14. 29 *H.* 6. 36. though generally the Grantee did ſue in the King's Name, but that was only that he might take Advantage of the Prerogative.

Now let us ſee how far the Wife's Debts were liable in theſe Caſes.

In Caſe of Forfeiture, as by Outlawry, *&c.* the Debts of the Wife were always extended and ſeized.

In Caſe of Aſſignment of Debts to the King, *Holt* 253. is a Caſe in Point, that ſuch Debts may be aſſigned to the King.

Debts due to Wife *dum ſola* forfeitable and aſſignable to the King by the Huſband.

And that notwithſtanding the Statute 7 *Jac. c.* 15. which makes Aſſignments of Debts void, other than ſuch as did grow due originally to the King's Debtor *bona fide*, for the Purpoſe of the Law was that no Debts of the King's ſhould procure another Man's Debt to be aſſigned, which was a common Practice; but this, ſays the Book, is his own Debt, though not to his own Uſe, which he may himſelf releaſe and diſcharge, and by the ſame Reaſon aſſign.

This proves two Things.

1. That the Huſband might aſſign the Debts due to the King at Common Law.

2. That he was not reſtrained to do it by the Act, becauſe they were the Huſband's own Debts.

This Reaſon concludes to the Caſe at Bar; for

1. It

1. It is the Husband's own Debt within the Words of the Act.

2. The Husband might assign it, *ergo* so may the Commissioners.

Besides it is to no Manner of Purpose, and can serve no good End at all, to say that such Debts are not assignable, for if they should be left in the Husband, as soon as ever he recovers them, the Commissioners must have the Money, and apply it to the Use of the Creditors.

But in Order to confine the Sense of the Words "Debts due and owing to him," it has been objected that the Statute does not extend to Debts due to a Bankrupt as Executor.

Answer. That is true, and it is for this particular Reason, because they are appropriated to pay the Debts of the Testator, and if they were assigned it would be a Wrong, a *Devastavit*. Objection.

2d Objection. That the Statute does not extend to Debts due to the Bankrupt jointly with another.

Answer. The Case in *Lev.* 17. cited for that Purpose, is not determined. Such a Debt might be assigned to the King by any one of the Commissioners, and so it is adjudged *Mich.* 19 *H.* 6. 47. and it would be forfeited by Outlawry of one.

However that Caſe is not before us; thus far is plain, that a Debt due by him and another would be within this Act of 4 *An. c.* 17. for it is ſo declared by the Declaratory Act of 10 *An. c.* 15. *ſect.* 3. which provides at the ſame Time that the Diſcharge of the Bankrupt ſhall not extend to diſcharge the other joint Debtor.

But this of the Huſband and Wife is a different Caſe, for it is his Debt as he is one with her.

3d Objection. That the Bankruptcy ought not to give the Huſband a better Right in his Wife's Debts, and bar her of the Contingency of Survivourſhip.

Anſwer. It does not give him a better Right, for his Releaſe for a Conſideration to himſelf alone would have barred her of the Contingency, and this is a Releaſe in Law, and amounts to the ſame thing.

Beſides, this is anſwered by the Fiction of Law, whereby the Statute of 1 *Jac.* 1. *c.* 15. and this Act has made it as a Debt paid, and a new Security taken to the Aſſignes. Suppoſe a Bond were made to *A.* in Truſt for *B.* who becomes Bankrupt, the Aſſignees may bring the Action in their own Name, though *B.* muſt have brought it in the Name of the Truſtees.

4th Objection. The Huſband may join with the Wife in this Action, but the Aſſignees cannot

cannot do it; this is answered as before, and the Case of Forfeiture and Assignment to the King; but to put another Case; Suppose a Bill of Exchange made to the Wife *dum sola*, the Husband may assign it, and Assignee shall bring the Action in his own Name.

This Reasoning holds stronger in the Case of Debts due from the Wife, for it is certainly the Husband's Debt, and the Action is brought in the *Debet* and *Detinet*; it is admitted to be the Husband's Debt after Judgment, and it is hard to say a Judgment of Law charges a Man with a Debt who was not chargeable with it when that Judgment was given. Debts due from the Wife considered.

2. If the Intent of the Act be considered, and the Queen be asked *cui bono* this could be? it will appear still stronger.

The Persons concerned in this Matter are first the Bankrupt, secondly the Creditor, thirdly the Wife.

As to the Bankrupt.

If an Action be brought against him on such a Bond, what Excuse can the Defendant have? If he takes a *Fieri fac'*, or *Elegit*, as soon as he finds Goods or Lands, the Commissioners ought to seize them.

This would be wholly ineffectual, and if he sues out a *Capias*, it will only serve to lay the Bankrupt up in Prison, when all his Estate,

tate, wherewith he ſhould make Satisfaction and deliver himſelf, is taken out of his Power.

And that is the Reaſon of his being diſcharged, becauſe his Ability to pay is intirely taken from him.

And this differs it from the Caſe of an Executor, and ſhews that he ought not to be diſcharged as to the Teſtator's Debts, for he retains his Ability to pay them by keeping the Effects which he has as Executor, and the Commiſſioners cannot meddle with them becauſe they are appropriated.

It was inſiſted at the Bar, that he ought to be diſcharged from all his Debts, becauſe he is obliged to part with all his Eſtate liable to pay thoſe Debts; but this takes it up much too narrow, for he is not only obliged to deliver up all his Eſtate liable to pay Debts, but all whatſoever wherewith he might pay his Debts, as to the Purpoſe, Copyhold Lands which are liable to no Execution.

Creditor. 2dly, As to the Creditor.

It cannot be for his Benefit that his Debt ſhould not be within the Act, for the Bankrupt's whole Eſtate will be otherwiſe diſpoſed of, and his Action againſt the Bankrupt can be worth nothing, but if his Debt be within the Act, then he may come in for his Dividend.

The

The Conſequence of the contrary Opinion is, that you take from him every Thing wherewith his Debts may be paid, and will not let him in for a Share.

3dly, As to the Wife. Wife.

It will be a Diſcharge to her at leaſt temporary during the Huſband's Life, but though it is not neceſſary to give any Opinion upon that, yet I think it will amount to a perfect Releaſe, and the Wife will be diſcharged for ever, and then no Harm can ariſe from this, for the Creditor is ſuppoſed to have his Dividend, and the Debt is paid in Conſideration of Law. Wife is for ever diſcharged by the Diſcharge of the Bankrupt Huſband.

A Caſe may poſſibly be put, where a Woman being in Debt may make over all her Effects in Truſt, and then marry a Bankrupt, and by that diſcharge all her Debts, and yet preſerve her Eſtate, but that would be a fraudulent Conveyance againſt the Creditors *quoad* ſo much of the Eſtate as would ſatisfy their Debts; and they would have Remedy.

It was objected, that the Diſcharge is a perſonal Privilege, and not communicable to his Wife.

Anſwer. It is a neceſſary Conſequence that it muſt extend to her, becauſe every Thing in the Huſband's Power is aſſignable, and all her Eſtate is in his Power. If the Huſband be poſſeſſed of a Term for Years in Right of his Huſband poſſeſſed of a Term for Years *in jure uxoris*, it may be ſeized on

 Fi. fa.

Wife, it may be ſold on a *Fi. fa.* and yet it is not actually transferred to the Huſband by the Intermarriage.

For theſe Reaſons we are of Opinion, that this is the Huſband's Debt within the Meaning of this Statute.

2. As to the ſecond Queſtion, whether the Plea be good or not, we are all of Opinion that it is ill, and ought to conclude to the Country.

A Liberty in pleading generally, is given to the Bankrupt, that ſo he may avoid the Hazard of pleading ſpecially, but then he muſt take upon him the Proof of his Conformity to the Statute in every Particular; or if he thinks fit to plead the Matter ſpecially, then he muſt ſet forth every Point, and by it he has this Advantage againſt the Plaintiff, that he muſt reply one Particular only upon which Iſſue muſt be taken.

Here the Defendant has pleaded the Matter ſpecially, but not ſet forth the whole, and therefore ill for that Reaſon, for by the expreſs Words of this Act this is to be pleaded ſo as the whole Merits may be tried, for the ſpecial Matter is to be given in Evidence.

There are ſeveral Caſes at Common Law where a Man ſhall conclude his Plea to the Country, though there be no Affirmative and Negative,

Negative, to prevent the Inconvenience that would arise by going on to a Replication. 33 *H.* 6. 21. To a Fine *quod partes finis nihil habuerunt, et de hoc ponit se super patriam.*

So in Counter-plea of Voucher, that he never was seised of such Estate whereof he could enfeoff him, and *hoc petit, &c.*

So *nunques seisie que Dower, et de hoc, &c.*

And the Reason of this is, that it would be inconvenient to go on to a Replication, because to reply generally, would leave it too large and comprehensive, and to reply any particular Kind of Estate would be too narrow, and consequently immaterial.

This Statute has formed a new general Issue in this Case, and this was the Foundation of the Judgment in *Bird* and *Lacy*'s Case. *Mich.* 6 *An. C. B. Rol.* 321. that a Plea upon this Act was well concluded to the Country; and if so, it cannot conclude to the Court.

It may be observed on the Statute of Sewers *, that by the very Words of that Act, a general Replication is expresly given, to avoid forcing the Plaintiff to a single Point, and so the Mischief, which would have been in this Case, is prevented. Thus it must have been in this Act, if

* 23 Hen. 8. c. 5.

if the Intention of it had not been to make the Plea a general Iſſue.

For this Fault in the Plea, which is ſhewn for Cauſe of Demurrer, and which would put a Difficulty on the Plaintiff, not intended by the Statute, Judgment muſt be given for the Plaintiff.

ERRATA.

In Page 305, *Line* 17. inſert the Words "a Juſtification."

A TABLE OF THE PRINCIPAL MATTERS.

A.

ABATEMENT. *Page* 40
—Prayer of *Jud' de Nar'* is in Bar, not in Abatement. 138
Action for Words, 114, 243, 246, 285, 287.
—— not to be diſcountenanced. 117
—— of Debt againſt an Heir. 141
—— on Aſſignment of a Bail-Bond. 77
—— by an Executor. 143
—— choſe in it, may be aſſigned to the King, and he or his Grantee may have an Action for it in their own Names. 321
Adminiſtrator, double Plea by him. 311
Affidavit, Requiſites in it to put off a Trial for want of a material Witneſs. 316
Agreement under Seal, Action of Debt brought thereon. 237
Appeal from an Order of Baſtardy lies not from a Corporation to the County Seſſions. 296

Appear-

Appearance, Debt upon Bond for it. *Page* 254
—— whether Juſtices can convict in Default of it without expreſs Power given by the Statute. 284
Apprentice, Order of Juſtices to receive one bound by the Churchwardens quaſhed, *quia* Indenture contained a Covenant not according to the Statute, and that avoided the whole Indenture. 278
Apprenticeſhip, Indictment upon 5 *Eliz. c.* 4. for exerciſing a Trade not having ſerved one. 241
Aſſignment of a Judgment whether a Condition precedent to Payment of the Money. 40
—— of a Bail-Bond. 77, 143
Aſſumpſit. 53
—— Rule to bring Money into Court on a Special one denied. 130
Attachment. 81
—— of Contempt on *Excom' cap'* denied. 85
Award. 111, 118, 125
—— Releaſe to the Time of it void, *quoad* all Things after Submiſſion. 119
—— of Money to Arbitrators themſelves void. 119
—— of Money before due void. 126
—— of ſubſequent Payments good. 318
—— Debt upon Bond for Performance thereof. 319

B.

BAIL-Bond, Action on Aſſignment thereof. 77
—— by Executors. 143
—— Civil. 59, 290

Bail, additional. *Page* 60
—— upon the Removal of an Indictment of Petty Larceny. 4
—— malicious holding thereto actionable. 163, 179
—— in High Treason. 310
Baker's Conviction on Assize of Bread quashed. 132, 244
Bankrupt, Note given by him to Creditor to sign his Certificate Action thereon. 49, 139
—— how to plead his Bankruptcy. 49
—— Intent of the Statute against them. 320
—— Wife is for ever discharged by the Discharge of her Husband Bankrupt. 327
Bankruptcy, Debts of the Wife while sole, are discharged by the Husband; so that Debts due to the Wife while sole, though unrecovered, are assignable by Commissioners of Bankruptcy against the Husband by 4 & 5 *An.* 318
Baron and Feme, in an Action for Words by them, joint Damages must be given to both, unless special Damages laid to the Husband. 287
Bar, Prayer of *Jud' de Nar'* is not in Bar, but Abatement. 138
Bastardy, Order of. 2
—— Appeal therefrom lies not from Corporation to County Sessions. 296
Birth Place of; Vagrants sent thither. 54
Bond, Diversity between a Breach in an Action of Covenant, and in a Replication on Bond for Performance of Covenants. 240
Books of the College of Physicians, Rule to inspect them denied. 134

Bread, Conviction on Statute of Aſſize thereof quaſhed. *Page* 132, 244
Buſineſs, Words of a Tradeſman in it. 314

C.

Carrier, Action againſt him. 84
Cattle, Juſtification in Treſpaſs for taking them. 135
Certificate ſigned by Creditors on having a Note from the Bankrupt. 49, 139
Certiorari to the *Old Bailey*. 13
—— before Juſtices of the Peace on the Game Act quaſhed, becauſe ſame Perſon both Informer and Witneſs. 111
—— to the Grand Seſſions of *Wales* diſcretionary. 160
—— Return of it. 162, 234
Cheat, Indictment for it not quaſhed. 49
Choſe in Action may be aſſigned to the King, and he or his Grantee may have an Action for it in their own Names. 321
Clergyman, Libel for him for Defamation. 98
Clerk of a Pariſh, Rule *Niſi* for a Prohibition to a Suit in the Eccleſiaſtical Court for a Rate for him. 180
Cognizance of penal Statutes is not in the Seſſions of Peace. 184
Commiſſioners of Bankrupt may aſſign Debts due to the Wife while ſole, though unrecovered againſt the Huſband. 318
Commitment upon the Game Act for want of Diſtreſs till he ſhould be diſcharged by due Courſe of Law, quaſhed. 231

Commitment muſt expreſs the Time when a Statute directs Impriſonment for a certain Time. *Page* 232
—— after it in Default of Diſtreſs, Juſtices cannot diſcharge on paying the Penalty. 232
—— Copy of it muſt be produced on moving for an *Habeas corpus.* 233
Common Carrier, Action againſt him. 84
Common Council Man, *Mandamus* to the Corporation of *London* to ſwear him. 255
Common Law, Evidence at it. 112
—— The beſt Way of conſtruing Statutes is by the Rules of it. 320
—— Summary Trials in Derogation of it. 112
Communia quid. 14
Concilium, whether upon a Demurrer being made a *Concilium*, on *Oyer* of a Deed, Plaintiff may amend a Miſtake in the *Oyer.* 289
Condition, whether Aſſignment of a Judgment be a precedent one to Payment of Money. 40
—— Words of, muſt be conſtrued by Recital. 240
—— not ſhewn ill, on Debt upon Bond for Appearance. 254
Conſtitution, Plea in *Quo warranto* of the Conſtitution of a Town equally ill if it enlarges or abridges it. 313
Conſultation cannot be in a Prohibition, unleſs Defendant ſhews a Right in himſelf. 132
Contract uſurious, Indictment for one. 103, 136

Conviction for Deer-ſtealing quaſhed. *Page* 120, 282
—— of a Baker on Aſſize of Bread quaſhed. 132, 244
Corporation may ſue by that Name where one of Incorporation and another to ſue by. 249
—— Its Name need not be ſtrictly purſued in Grants. 250
—— but otherwiſe in Writs. *Ibid.*
—— Grant of Lands amounts to it for Neceſſity. 252
—— Plea of Miſnomer of it, if they have Power to ſue by that Name, they muſt ſhew it. 253
—— Appeal lies not from it, on an Order of Baſtardy to County Seſſions. 296
Coſts not allowed for Want of a Declaration on a Writ of Privilege. 248
—— Conſtruction of the Clauſe in 5 *Ann. c.* 16. for bringing Principal, Intereſt and Coſts into Court upon Bond as to the Coſts. 291
Covenant, Diverſity between a Breach in an Action of Covenant, and in a Replication on a Bond for Performance thereof. 240
—— *Err' brev'*, Conuſor dying before the Return of it, though *Queen's* Silver actually paid. 316
Country, Plea on the Act of 4 & 5 *An. c.* 16. concerning Bankrupts, muſt conclude to it. 318
Courts Spiritual, Rule for Defamatory Words in them. 100
—— Protection of a Witneſs going and coming from it. 308

Crown, King's Grants conſtrued in a double Intent, only for its Benefit. *Page* 252

D.

Damages, in Action for Words by Baron and Feme joint Damages muſt be given to both, unleſs ſpecial Damages laid to the Huſband. 287
Daughter-in-Law not to be maintained by Father-in-Law. 130
Debt againſt Heir at Law. 141, 279
—— upon Aſſignment of Bail-Bond by Executor. 143
—— brought upon an Agreement under Seal. 237
—— upon a Bond with ſpecial Conditions. 238
—— upon Bond for Appearance. 254
—— upon Bond for Performance of an Award. 317
—— of the Wife while ſole, diſcharged by the Bankruptcy of the Huſband, ſo that Debts due to the Wife while ſole though unrecovered, are aſſignable by Commiſſioners of Bankruptcy againſt the Huſband by 4 & 5 *Ann.* and the Plea upon the Act muſt conclude to the Country. 318
—— due to Wife *dum ſola*, forfeitable and aſſignable to the King by the Huſband. 322
—— due from the Wife conſidered. 325
Declaration, *Superſedeas* for not declaring within two Terms. 5

Deed, whether after *Oyer* of it and Demurrer made a *Concilium*, Plaintiff may amend a Miſtake in it. *Page* 298
Deer-ſtealing, Conviction for it quaſhed. 120, 282
Defamation of a Clergyman, Libel thereon. 98
Delivery and Satisfaction pleaded. 234
Demurrer, whether after it is made a *Concilium* upon *Oyer* of a Deed, Plaintiff may amend a Miſtake in the *Oyer*. 298
Deſcent, *Riens per Deſcent die impetrat' brevis* pleaded in Debt againſt an Heir. 279
Deviſe, what makes Tenant in Tail, and what Tenant for Life. 20, *&c.* 129
Diſtreſs, Commitment upon the Game Act for Want of it, till he ſhould be diſcharged by due Courſe of Law, quaſhed. 231
Diſtribution of *Reſiduum* ſued for againſt Executor, he having a Legacy by the Will. 16, 52
Double Pleadings. 123
—— Plea by Adminiſtrator. 311

E.

Eccleſiaſtical Court, Rule *Niſi* for a Prohibition to a Suit there for a Pariſh Clerk's Rate. 180
Error. 13, 61, 75, 104, 237
—— of a Fine. 315, 316
—— and Record, Variance between them. 91, 101, 299
Evidence at Common Law. 112
—— Conviction on Statute of Aſſize of Bread, quaſhed. 132, 244

Exceptions to a Witneſs. *Page* 112
Excom' cap'. 86, 289
—— Attachment denied for letting Defendant go at large thereon. 85
—— King's Bench Juriſdiction over it. 88
Execution, Notice thereof on a *Scire fieri Inquiry* to be given. 95
Executor, *Venue* changed by him. 1
—— Suit againſt him for Diſtribution of *Reſiduum* of the Teſtator's perſonal Eſtate, having a Legacy left him by the Will. 10, 52
—— Action of Debt by him on an Aſſignment of a Bail-Bond. 143

F.

Father not obliged to maintain his Daughter-in-Law. 130
Fieri facias. 58
Fine, Error of it. 315
Foreſtalling, Indictment for foreſtalling Goods coming *Mercat' de Darkin vendend'*, held naught on Demurrer. 276
Forgery, Words importing a Charge of it held actionable. 246.
Form, ancient one of Writs to Parliament. 128
Freighters, Suit againſt them, *&c.* by Mariners, *&c.* 9

G.

Game Act, *Certiorari* thereon before Juſtices of the Peace quaſhed, becauſe ſame Perſon both Informer and Witneſs. *Page* 111
—— Commitment thereon for Want of Diſtreſs, till he ſhould be diſcharged by due Courſe of Law, quaſhed. 231
Goods, Indictment for foreſtalling them coming *Mercat' de Darkin vendend'*, held naught *ſur* Demurrer. 276
Grant of the King not to enure to a double Intent. 249
—— Corporation may ſue by that Name. 251
—— corporate Name need not be ſtrictly purſued in it. 250
—— the King's conſtrued in a double Intent, only for the Benefit of the Crown. 252

H.

Habeas Corpus to the *Savoy* for the Impriſonment of a Soldier there by a Captain. 102
—— cannot be moved for without a Copy of the Commitment. 233
—— Return of it quaſhed, becauſe no Authority appeared in the Perſon ſigning the Warrant. 291
Heir, Debt againſt him. 141, 279
High Treaſon, Outlawry for it reverſed. 46
—— Bail in it. 310
Huſband, in Action for Words by Baron and Feme joint Damages muſt be given to both, unleſs ſpecial Damages laid to him, 287

Huſband, Debts of the Wife while ſole are diſcharged by his Bankruptcy. *Page* 318
—— Debts due to Wife *dum ſolâ* forfeitable and aſſignable to the King by him. 322
—— Wife is for ever diſcharged by the Diſcharge of the Bankrupt Huſband. 327

I.

Impriſonment, when a Statute directs it for a certain Time, the Commitment muſt expreſs it. 232
Indenture, Order of Juſtices to receive an Apprentice bound by the Churchwardens quaſhed, becauſe it contained a Covenant not according to the Statute, and that avoided the whole Indenture. 278
Indictment, Bail upon the Removal of one for petty Larceny. 4
—— for a Cheat not quaſhed. 49
—— for an uſurious Contract. 133, 136
—— refuſed to be quaſhed, 19, 41
—— for Words. 36
—— upon 5 *Eliz. c.* 4. for exerciſing a Trade not having ſerved an Apprenticeſhip. 241, 308
—— for foreſtalling Goods coming *Mercat' de Darkin vendend'*, held naught on Demurrer. 276
—— Charge in it muſt be laid in the Words of the Statute. 277
Information *Quo warranto*, where it may be againſt an Officer ſworn in by a peremptory *Mandamus*. 122
—— for an Office and Franchiſe. 145 to 160

Information, for a Libel and Part of the Judgment remitted. *Page* 297
—— Rule to plead upon Terms thereon. 6
—— for Words. 57
—— againſt a Borough in two Counties, *Venire* from one. 32
Informer not a good Witneſs on the Game Act. 114
Innuendo, Words laid only with it, and not to be ſpoke of the Plaintiff. 288
Inqueſt of Office not made but for Neceſſity. 280
Inquiry on a *Scire fieri*, Notice of the Execution of it to be given. 95
—— *Regula generalis* thereon. 96
Iſſue, when they take by Purchaſe. 180
—— A Word of Limitation in a *Will*. 181
Intereſt, Conſtruction of the Clauſe in the Act 5 *Ann. c.* 16. for bringing Principal, Intereſt and Coſts into Court upon Bond, as to the Coſts. 291
Intent of the Statute againſt Bankrupts. 320
Judgment, whether Aſſignment of it be a Condition precedent to the Payment of Money. 40
—— Reverſal thereof. 62
—— Part of it remitted on an Information for a Libel. 297
Juriſdiction of King's Bench over *Excom' cap'*. 88
—— of the Seſſions of the Peace does not extend to Uſury. 103, 136
Jury, Rule for a good one in *Middleſex*. 130
—— held that they muſt inquire of the Value by a particular Inqueſt, after the Iſſue found for the Defendant. 280

Juſtices

Juſtices of Peace, Indictment for Words ſpoken to them in their Office. *Page* 36
—— after Commitment in Default of Diſtreſs they cannot diſcharge on paying the Penalty. 232
—— their Order to receive an Apprentice bound by the Churchwardens quaſhed, *quia* Indenture contained a Covenant not according to the Statute, and that avoided the whole Indenture. 278
—— whether they can convict in Default of Appearance without expreſs Power given by the Statute. 284
Juſtification in Treſpaſs for taking Cattle. 133

K.

King, *Choſe in Action* may be aſſigned to him, and he or his Grantee may have an Action for it in their own Names. 321
—— Debts due to Wife *dum ſola* forfeitable, and aſſignable to him by the Huſband. 322
King's Bench its Juriſdiction over an *Excom' cap.* 88
King's Grant, not to enure to double Intent. 249
—— Corporation may ſue by that Name. 251
—— conſtrued in a double Intent only for the Benefit of the Crown. 252

L.

Larceny petty, Bail upon the Removal of an Indictment for it. *Page* 4
Law Common, Evidence at it. 112
—— Summary Trials in Derogation of it. *Ibid.*
—— the beſt Way of conſtruing Statutes is by the Rules of it. 320
Legacy, Executor having one by Teſtator's Will, ſued for Diſtribution of *Reſiduum*. 10, 52
Legal Proceedings and Summons to Parliament, their Difference. 102
Libel, Prohibition denied before one iſſued. 91, 131
—— for Defamation of a Clergyman. 98
—— on an Information for it, Part of the Judgment remitted. 297
Limitation, Iſſue a Word of Limitation in a Will. 181
—— in a Will not different from a Deed, where proper legal Words are uſed. 184

M.

Maintenance, Order for it quaſhed. 137
Malicious Proſecution, Action for it. 179, 185
Mandamus, where an Information *Quo warranto* may be againſt an Officer ſworn in by a peremptory *Mandamus*. 122
—— no Right but the Title to the Office remains as before. 259
—— directed to the Corporation of *London*, to ſwear a Common Council Man. 255
Mariners Suit by them, *&c.* againſt Owners, *&c.* 9

Miſnomer of Corporation, Plea thereof, if Power to ſue by that Name muſt ſhew it. *Page* 252
Money, whether Aſſignment of a Judgment be a precedent Condition to the Payment of it. 40
—— Award thereof, to the Arbitrators themſelves. 119
—— or before due, void. 126
—— Rule to bring it into Court denied. 130
Motion for a new Trial upon a Point of Law, not inſiſted on at the former Trial. 120
—— Notice muſt be given of it to diſcharge a Rule. 311

N.

Neceſſity, Inqueſt of Office not made but for it. 280
Noſme de Dignite. 102
Note, what good. 93
—— given by Bankrupt to a Creditor to ſign his Certificate. 49, 139
Notice of the Execution of a *Scire fieri* Inquiry to be given. 95
—— muſt be of Motion to diſcharge a Rule. 311

O.

Office, *Mandamus* no Right but the Title to it remains as before. 259
—— Inqueſt of it not made but for Neceſſity. 280
Old Bailey, *Certiorari* thither. 13
Omiſſion. 17

Order

Order of Baſtardy. *Page* 2
—— of Vagrancy. 9
—— muſt be obeyed. 138
—— of Removal. 97
—— quaſhed. 65
—— of Seſſions on Father to keep Son's Widow quaſhed. 130
—— for Maintenance quaſhed. 137
—— of Settlement quaſhed. 161
—— to receive poor Perſons till Quarter-Seſſions, quaſhed. 162
—— of Juſtices to receive an Apprentice bound by the Churchwardens quaſhed, *quia* Indenture contained a Covenant not according to the Statute, and that avoided the whole Indenture. 278
—— of Baſtardy, Appeal from it lies not from Corporation to County Seſſions. 296
Outlawry for High Treaſon reverſed. 46
Owners Suit againſt them, *&c.* by Mariners, *&c.* 91
Oyer of a Deed, whether after it, and Demurrer being made a *Concilium*, Plaintiff may amend a Miſtake in it. 298

P.

Pariſh Clerk, Rule *Niſi* for a Prohibition to a Suit in the Eccleſiaſtical Court for a Rate for him. 180
Parliament, ancient Form of Writs to it. 102
—— Summons thereto, and legal Proceedings, their Difference. 102
Payment of Money, whether the Aſſignment of a Judgment be a precedent Condition to it. 31, 131

Payment

Payment, Award of ſubſequent Payments good. *Page* 318
Penal Statutes are not within the Cognizance of the Seſſions of the Peace. 104
Penalty, after Commitment in Default of Diſtreſs, Juſtices cannot diſcharge on paying it. 232
Petty Larceny, Bail upon the Removal of an Indictment for it. 4
—— Seſſions, Indictment for Words ſpoken to Juſtices of the Peace there. 36
Pew, Prohibition for it. 122
Phyſicians College, Rule to inſpect their Books denied. 134
Plea in *Quare impedit.* 68
—— Replication. 68
—— general Obſervations on Writ and Plea. 69
—— Import of Plea at Common Law. 70
—— Double. 123
—— by Adminiſtrator. 311
—— of Performance to an Action upon Bond with ſpecial Conditions. 238
—— of Miſnomer of a Corporation, if Power to ſue by that Name, muſt ſhew it. 253
—— in *Quo warranto* of the Conſtitution of a Town equally ill, if it enlarges or abridges that Conſtitution. 313
—— upon 4 & 5 *An. c.* 16. touching Bankrupts, muſt conclude to the Country. 318
Poor Perſons, Order to receive them till Quarter-Seſſions quaſhed. 162
Prohibition. 2, 8, 9, 10
—— denied before Libel iſſued. 91, 131
—— for a Pew. 124
—— on a Libel for Defamation of a Clergyman. 98

Prohibition, never granted on Part of the Caſe. *Page* 131
—— Conſultation cannot be in it, unleſs Defendant ſhews a Right in himſelf. 132
—— Rule *Niſi* for one to a Suit in the Eccleſiaſtical Court for a Rate for a Pariſh Clerk. 180
Principal, Intereſt and Coſts, Rule to bring them in conſtrued. 288
—— Conſtruction of the Clauſe in 5 *Ann. c.* 16. for bringing Intereſt and Coſts into Court upon Bond, as to the Coſts. 291
Privilege, Coſts not allowed for Want of a Declaration on a Writ of Privilege. 248
Promiſſory Note what good. 93
Protection of a Witneſs going and coming from Court. 308
Purchaſe, when Iſſue take by it. 180

Q.

Quare impedit. 67, 248
—— Count therein. 67
—— Plea. 68
—— Replication. 68
—— General Obſervations. 69
—— Import of the Plea at Common Law. 70
Quarter-Seſſions, Order to receive poor Perſons till then quaſhed. 162
Queen's Silver, Error brought on a Fine, for that Conuſor died before the Return of the Writ of Covenant, though the *Queen*'s Silver actually paid. 314
Quo warranto Information, where it may be againſt an Officer ſworn in by peremptory *Mandamus*. 122

Quo Warranto, for an Office and Franchiſes. *Page* 145 to 160
—— Plea in it of the Conſtitution of a Town equally ill, if it enlarges or abridges that Conſtitution. 313

R.

Rate, Rule *Niſi*, for a Prohibition to a Suit in the Eccleſiaſtical Court for a Pariſh Clerk's Rate. 180
Recital, Words of Condition muſt be conſtrued by it. 240
Recognizance on *Scire facias* againſt Bail recited in the preſent Tenſe. 290
Regnum Angl' none ſince the Union. 242
Regula on civil Bail. 59, ſee 290
Releaſe to Time of Award void, *quoad* all Things after Submiſſion. 119
Removal, Order of. 97
Replevin *de una Parcella Lintei*. 233
Repugnancy. 110
Reſiduum ſued for to be diſtributed againſt Executor who had a Legacy by the Will. 10, 52
Return of *Habeas Corpus* directed to the *Savoy* for the Impriſonment of a Soldier by a Captain. 102
—— quaſhed becauſe no Authority appeared in the Perſon ſigning the Warrant. 291
—— to *Certiorari*. 162, 234
Reverſal of Judgment. 26
—— of an Outlawry for High Treaſon. 46
Riens per deſcent pleaded. 279
Rule for a good Jury in *Middleſex*. 130
—— to bring Money into Court on a ſpecial *Aſſumpſit* denied. 130

Rule

Rule for Words indictable. *Page* 39
—— for understanding scandalous Words. 116
—— of defamatory Words in spiritual Courts. 100
—— on College of Physicians to inspect their Books. 134
—— *Nisi* for a Prohibition to a Suit in the Ecclesiastical Court for a Rate for a Parish Clerk. 180
—— to bring in Principal, Interest and Costs, construed. 238
—— Notice must be given on Motion to discharge it. 311

S.

Satisfaction and Delivery pleaded. 234
Savoy, Return of *Habeas Corpus* directed there for the Imprisonment of a Soldier by a Captain. 102
Scire facias against Bail, the Recognizance recited in the present Tense. 290
Scire fieri Inquiry, Notice of the Execution thereof to be given. 95
Sessions of the Peace has not Cognizance of penal Statutes. 104
—— an Order thereof on a Father to keep his Son's Widow quashed. 130
—— petty, Indictment for Words spoken to Justices holding them. 36
—— its Jurisdiction does not extend to Usury. 103, 136.
—— Appeal lies not from an Order of Bastardy from a Corporation to the County Sessions. 299

Spiritual

Spiritual Courts, Rule for Defamatory Words in them. *Page* 100
Statute penal not within the Cognizance of Seſſions of the Peace. 104
—— when it directs Impriſonment for a certain Time the Commitment muſt expreſs it. 132
—— Charge in Indictment on it muſt be laid in the Words of it. 277
—— Order of Juſtices to receive an Apprentice bound by the Churchwardens quaſhed, *quia* Indenture contained a Covenant not according to the Statute, and that avoided the whole Indenture. 278
—— *Indeb' Aſſ.* laid one Day, Statute of Limitation pleaded, Replication that Promiſe was made on a different Day. 279
—— 5 *Ann.* c 16. Conſtruction of the Clauſe of this Statute for bringing Principal, Intereſt and Coſts into Court upon Bond, as to the Coſts. 291
—— Intent of it againſt Bankrupts. 320
—— the beſt Way of conſtruing it is by the Rule of the Common Law. 320
Suggeſtions ought to purſue Allegation below. 131
Suit by a Maſter and Mariners againſt Owner, &c. 9
—— againſt Executor for Diſtribution of *Reſiduum*, having a Legacy by the Will. 10, 52
Sum in Groſs. 2
Superſedeas for not declaring within two Terms. 4
Summary Trials in Derogation of the Common Law. 112

Summons to Parliament, and legal Proceedings, their Difference. *Page* 102

T.

Term, *Superſedeas* for not declaring within two. 5
Trade, Indictment upon 5 *Eliz. c.* 4. for exerciſing it, not having ſerved an Apprenticeſhip. 241
Tradeſman, Words ſpoken of him in his Way of Buſineſs. 314
Treaſon High, Outlawry for it reverſed. 46
—— Bail in it. 310
Treſpaſs for taking Cattle. 135
—— Juſtification thereon. *ibid.*
Trial, Motion for a new one on a Point of Law not inſiſted upon at the former. 120
——Reaſon of new one. 123
——Requiſites in Affidavit to put it off for want of a material Witneſs. 316

V.

Vagrancy Order of. 9, 54
Variance between Writ of Error and Record. 91, 101
Venire from one County on an Information againſt a Borough that lies in two. 32
——*de novo* awarded. 311
Venue changed by Executor. 1
Verdict, how Words in a Count are to be taken after it. 75
Union, no *Regnum Angliæ* ſince. 242
Uſurious Contract, Indictment for one. 103, 136

Uſury, the Juriſdiction of the Seſſions of the Peace does not extend to it. *Page* 103, 136

W.

Wales, Certiorari to the Grand Seſſions there diſcretionary. 160
Warrant, Return of *Habeas Corpus* quaſhed becauſe no Authority appearing in the Perſon ſigning it. 291
Wife, her Debts while ſole are diſcharged by the Bankruptcy of the Huſband, ſo that Debts due to her while ſole, though unrecovered are aſſignable by Commiſſioners of Bankruptcy againſt the Huſband, *per* Statute 4 & 5 *Annæ*. 318
—— Debts due to her *dum ſola* forfeitable, and aſſignable to the King by the Huſband. 322
—— Debts due from her conſidered. 325
—— is for ever diſcharged by the Diſcharge of the Bankrupt Huſband. 327
Will, Iſſue a Word of Limitation in it. 181
—— Limitation in it not different from a Deed where proper legal Words are uſed. 184
Witneſs where a Party intereſted may be a Witneſs. 113
—— Informer not a competent one in the Game Act. 111
—— Exception to them. 112
—— Protection of them going and coming from Court. 308
Words, Indictment for them. 36
—— Information for them. 57
—— Action for them. 114

Words, Rule for underſtanding ſcandalous. *Page* 116
—— not to be diſcountenanced. 117
—— Rule of Defamatory ones in Spiritual Courts. 100
—— how to be taken after Verdict. 75
—— of Condition muſt be conſtrued by the Recital. 240
—— what held actionable. 243, 283
—— importing a Charge of Forgery held actionable. 246
—— in Action for them by Baron and Feme joint Damages muſt be given to both, unleſs ſpecial Damages laid to the Huſband. 287
—— laid only with an *Innuendo*, and not to be ſpoke of the Plaintiff. 288
—— of a Tradeſman in his Way of Buſineſs. 314
Writs, ancient Form of them to Parliament. 102
—— corporate Name need not be ſtrictly purſued in them. 250
—— of *Excom' cap'*. 85
—— King's Bench Juriſdiction over *Excom' cap'*. 88
—— of Error and Record, Variance between them. 91, 101
—— Error on Writ of Covenant tho' *Queen*'s Silver paid. 314

A

TREATISE

ON THE

ACTION of DEBT.

THE CONTENTS OF THE BOOKS and CHAPTERS.

BOOK I.

CHAP. I.

OF the Action of Debt on ſimple Contracts. *Page* 358

CHAP. II.

Upon Deeds and Leaſes. 370

CHAP. III.

Where it lies for Rent, either where the Leſſee parts with the Term, or the Leſſor with the Reverſion. 383

The CONTENTS of the

CHAP. IV.

It lies on Matters of Record or Judgments of the Courts of Juſtice. *Page* 390

CHAP. V.

It lies upon Recognizances and Statutes. 394

BOOK II.

CHAP. I.

Of the Declaration in the Action of Debt. 399

CHAP. II.

Of ſuch Things as are of Courſe to be obſerved in it. 403

CHAP. III.

What Things are peculiar to it, where it is in the Name of the Heir, Executor or Aſſignee of the Reverſion. 408

CHAP. IV.

Of it on Judgments and Recognizances. 412

CHAP. V.

Of it againſt Bail. 416

BOOK

BOOK III.

CHAP. I.

Of the Pleas and Iſſues in the Action of Debt. *Page* 421

CHAP. II.

Of them in it for Rent. 428

CHAP. III.

Of the Pleas therein. 435

CHAP. IV.

Of them grounded on Judgments or other Records. 444

OF THE

OF THE
ACTION of DEBT.

BOOK the First,

CHAPTER the First.

In this Action is to be conſidered,

First, **Where and in what Caſes it lies.**

Secondly, **The Declaration.**

Thirdly, **The Pleas and Iſſues.**

First, **Where and in what Caſes it lies.**

And that will be found to be,

First, **On ſimple Contracts.**

Secondly, **On Leaſes and other Deeds, and**

Thirdly, **On Matters of Record.**

And, First of simple Contracts.

THESE we shall begin with, as doubtless they first obtained in the World, and were frequently used before the Invention of Writing or any of those Solemnities that have been introduced by civil Societies, as Guards against the Deceits and Injustice of Mankind. These Contracts then subsisting merely in the Agreement of the Parties without any Form of contracting, or Notoriety or Evidence of the Contract, save the Delivery of the Goods themselves; the Lender trusted intirely to the Faith of the Borrower. For in the Infancy of the World, before the Use of Money, Men had but two Ways of supplying themselves with the Fruits of the Earth or other Necessaries of Life. The first was by bartering or exchanging the Superfluities of those Fruits or Goods which they had acquired, for those of another Kind which they wanted. In this Exchange the Contract was executed on both Sides, so that no Room was left for Contention. The other Method was, if I had not Goods to exchange, and yet wanted some of my Neighbours, they were lent on my Faith to return Goods of the same Sort, and equal in Quantity and Value with those borrowed, or else to return any other Sort of Goods pitched upon by the Lender, as a Compensation for those he lent. Hence was the first Notion of a Debt created.

And

And in order to inforce the Return of the Goods at the Day agreed on, was the Action of Debt or Detinue instituted.

As the World increased and Commerce grew, it became necessary to find a certain Measure, by which the Value of all other Things might be adjusted; and this must be so durable as not to perish in its Passage or handing about from one to the other; and so portable as to be carried from Place to Place with Convenience. Hence Gold and Silver was pitched upon as the Measure of all other Things. And now the Borrower, instead of the identical Goods or Necessaries which he has Occasion for, if the Man from whom he expects such Supplies has them not, applies for a certain Quantity of Gold and Silver to be repaid at a future Day, which creates the Notion of Debtor and Creditor, in the same Manner as where a Man takes up Goods or Necessaries upon the Promise of paying or returning a certain Sum of Money for them at a Day certain.

But here by the Way we must observe the Rule laid down in the *Register* in the Formation of the Action of Debt; that if the Debtor fails in Payment of the Money at the Day, the Original commands him to pay the Sum which he owes and unjustly detains, but if the Demand be for Goods and Chattels living or dead, the Writ is for the Detinue only. So it is in Debt upon a Lease for Years where Corn is reserved instead of Money, the Action is for the Detinue only; because if the

Register 139. F. N. B. 119. m. Bro. 227. pl. 50. 3 Leon. 260. 4 Leon. 46.

Plaintiff has Judgment for the Detention, the Jury muſt aſſeſs Damages according to the Value of the Corn at the Time it was to be delivered by the Leaſe, and therefore it cannot be in the *Debet*, becauſe the Plaintiff would in ſuch Caſe recover a certain Sum.

As any Commodity may be reduced to a certain Value by Agreement, ſo alſo may Men's Labours or their Actions, and the Price agreed on is the Debt which ariſes from the doing and performing that Labour or Action. Hence it is that an Action of Debt lies for a Servant for his Wages. And if *A.* promiſes *B.* one hundred Pounds if *B.* will marry the Daughter of *A.* By the Marriage *B.* becomes intitled to the hundred Pounds, and may have an Action of Debt for the Recovery of it, becauſe the Obligation in *A.* to pay was to ariſe on the Celebration of the Marriage.

Raſt. Ent. 201, 202. F. N. B. 126. k.

Every Man is chargeable in an Action of Debt upon the Contract of his Bailiff, or of Servant, where he gives ſuch Servant Authority to buy and ſell for him; for by the very Appointment the Servant ſtands in the Maſter's Place, and as he tranſacts for the Maſter, the Credit muſt be ſuppoſed to be given in the Contract to the Maſter and not to the Servant, and therefore the Servant is not under the Obligation to perform according to the Rule; *Qui per alium facit, facit per ſe ipſum.* So the Huſband is made Debtor by the Act of the Wife, where ſhe hath Authority

F. N. B. 120. g.

rity from him to contract. *But what is Evidence of this Authority, and in what particular Caſes the Husband ſhall be chargeable with the Debts of the Wife, is treated of at large under the Head of* Aſſumpſit.

However, by the modern Reſolutions, the Wife cannot make a Contract, as the Attorney, or repreſentative of the Huſband. And therefore if ſuch Contract was found by ſpecial Verdict, it will not bind the Huſband. But if the Wife agrees for Goods which are delivered to the Huſband, or if the Wife has uſually contracted for the Huſband, this is Evidence to perſuade a Jury that the Huſband hath contracted. But if ſuch a Contract is found ſpecial, this will not bind the Huſband; becauſe it is only exhibiting to the Court the Evidence of a Contract which the Court cannot judge of, and the Wife by Law cannot contract ſo as to bind the Huſband. But theſe Acts of the Wife in theſe Caſes are not ſubſtantive Contracts to charge the Huſband, (as the Acts of a Bailiff or Servant are to charge the Maſter) but only Evidences of the Huſband's Contracts founded on their Co-habitation.

If a Feme ſole contracts a Debt and afterwards marries, the Huſband by the Intermarriage becomes the Debtor, and is liable to the Action of Debt; becauſe the Chattels of the Wife being veſted in the Huſband by the Marriage, he has thereby undertaken to pay her Debts; and for this Reaſon it muſt be in the *debet et detinet*. But the Creditor muſt bring his Action againſt both during the Coverture F. N. B. 120. f. Bro. 229. pl. 110.

verture. For if the Recovery be not had during the Life of the Wife, the Huſband is not liable after her Death, becauſe the Contract was made to the Wife and her Executors and Adminiſtrators, and though the Huſband is Adminiſtrator *De jure*, yet he need not repreſent her unleſs he pleaſes. But where a Judgment is obtained during the Coverture, there the Huſband is bound though the Wife ſhould afterwards die, becauſe the Judgment is againſt the Huſband himſelf who had obtained the ſole Dominion over the Chattels of the Wife.

Raſt. Ent. 159. Yelv. 23, 24. Jenk. 263. 2 Danv Abr. 496. pl. 23. Brownl. 82. S. C. Moor, 667. pl. 914. S. C. and S. P. Ow. 127. S. C. Cro. Eliz. 729. S. C. and S. P. and ſee Rol. Rep. 257, 391. Match 14. Danv. Abr. 26. pl. 2. 66. pl. 13. *c.*

If *A.* bails Money to *B.* to be delivered to *C.* on Demand, *C.* may have an Action of Debt againſt *B.* for the Money, becauſe by the Delivery of *A. B.* took it as the Property of *C.* and thereby made himſelf Debtor to *C.* for the Money.

If *A.* and *B.* account, and *B.* upon the Foot of the Account be found indebted to *A.* in a certain Sum, *A.* may recover it in an Action of Debt; becauſe *B.* lies under a perſonal Obligation to pay the Balance as well as any of the particular Sums in the Account, and the Account ſtated does not alter the Nature of the Debt, or the Obligation to pay it.

It was agreed that *C.* should pay unto *B.* five hundred Pounds for the Lands of *D.* adjudged that *B.* may have an Action of Debt for the five hundred Pounds against *C.* For this Agreement creates an Obligation to pay, and *C.* may have an Action of Covenant against *B.* to compel a Conveyance of the Land. Sid. 423. Lev. 274. Saund. 319, 320. Raym. 183. Yelv. 193. Polex. 14. 2 Keb. 542, 543. pl. 5. 3 Leon. 119.

pl. 169. Rol. Rep. 518. March 9. pl. 22. Hob. 35. Moor 135. pl. 280. See Lutw. 251. Ld. Raym. 665.

There are many other Cases where the Action of Debt lies from a bare Promise and Engagement of the Parties. For wherever a Man has set a certain Value on any Commodity, or Benefit received, or Work done, there is an Obligation to pay that certain Value agreed on, and the Obligation creates the Debt. But as these Debts were contracted for between the Parties themselves, without any Solemnities, and the Lender trusted intirely to the Faith of the Borrower for the Payment, it might happen, the Debt was paid in as private Manner as it was contracted for, and in such Case if the Borrower should be sued for it, he had no Evidence to prove the Payment, and so be doubly charged. To prevent this, and because the Money or the Goods were originally delivered on the Faith and Credit of the Borrower, the Defendant in this Action was admitted to Wage his Law: That is, by his own Oath to discharge himself of the Debt by swearing he had paid it, and by bringing eleven Persons more to swear to the Credit of his Oath, and that they believed what he swore was true. But this Manner Practice *B. R.* 513. to 519.

Manner of Defence, however reaſonable in its firſt Inſtitution, came afterwards to be ſo abuſed and applied to ſuch ill Purpoſes, that the Action of Debt came to be diſuſed, and the *Aſſumpſit* ſubſtituted in its Place, in which no Law Wager lay, becauſe in the *Aſſumpſit* nothing could be recovered but Damages for the Breach of the Promiſe, and thoſe Damages were to be aſcertained by a Jury, and therefore a Defendant could not diſcharge a Debt by his own Oath which was yet uncertain, and only in the Breaſt of a Jury to aſcertain.

Hard. 485. 2 Show. 9. 6 Mod. 129, 131. Lev. 298. 3 Lev. 118. Lutw. 180. 5 Mod. 13, 365. Salk. 125. Ld. Raym. 175. 2 Ld. Raym. 759. 10 Mod. 373. 11 Mod. 190.

But an Action of Debt does not *lie* againſt the Acceptor of a Bill of Exchange; for notwithſtanding the Acceptance the Drawer is liable, and the Acceptance is only in the Nature of a collateral Promiſe or Engagement to pay, which creates no Debt, though it lays the Acceptor liable to a ſpecial Action on the Caſe for the Promiſe. As where *A.* ſells Goods to *B.* at the Requeſt of *C.* and *C.* promiſes to pay the Money for them, if *B.* ſhould not; this creates no Debt in *C.* but *C.* is liable to a ſpecial Action on the Caſe.

12 Mod. 37, 107. Stra. 680.

Hard. 485.

If a Sheriff levies Money on an Execution, but does not pay it over to the Plaintiff, the Plaintiff ſhall have an Action of Debt againſt him though he made no Return of the Execution. For the Money, that is levied by the Sheriff by the Authority of the Writ, is levied for the Uſe of the Perſon that recovered it, and therefore the Sheriff is chargeable as for

for so much received to the Plaintiff's Use.

By *Holt* an Action of Debt lies for the Sheriff for his Fees in executing an *Elegit*, because Fees are certain Sums of Money settled by the Statute, and the Price of the Sheriff's Labour, and he cannot forbear executing the Writ, and therefore must have this Action to recover the Sum which the Statute hath made the Price of his Labour. So it is for the Fees of other Executions. Salk 209. Cro. Car. 286. Jones 307. Rol. Rep. 738. Cro. Jac. 103. Cro. Eliz. 335, 654. See Salk. 331, 333.

If any Contract be made to transfer the Right of Chattels, if it be immediately executed the Property is altered. Therefore if *A.* contracts to sell *B.* a Horse for ten Pounds, there if *B.* either pays or tenders the Money, *B.* has the Property in the Horse, and may bring Trespass, Trover or Detinue. So if *A.* tenders the Horse he may bring Debt or *Assumpsit* for the Money, for the Right of the Money is transferred by the Bargain, and if such Contracts were executory, that is, if either Party at any other Time after the Bargain made, by a Tender or Offer to perform his Part of the Bargain could not oblige the other to perform his, it would make all Contracts perfectly incertain. But where the Contract is executory on both Sides, there no immediate Right is tranferred, but only a Contract or Agreement made. As if *A.* had promised to deliver the Horse on a Day to come, and *B.* promised on such Delivery to pay ten Pounds; there if *A.* deliver or tender the Horse at the Day, he has a Right to the 18 Ed. 4. 12. Bro. Contract pl. 25.

Money. So if *B.* at the Day tender or pay the Money, he has a Right to the Horse. But *B.* has no Right to the Horse without the Tender of the Money, nor *A.* any Right to the Money without Tender of the Horse.

17 Ed. 4. 1. Bro. cont. pl. 25. Pegram and Palmer, Trin 12 Ann. B. R. per Parker.

But if *A.* tenders the Horse, and *B.* refuses to pay, *A.* need not deliver the Horse to *B.* for the Tender is sufficient if the Payment be not made by *B.* For on the Tender of *A.* the Payment of *B.* ought to have been made immediately by *B.* according to the Contract. But if the Contract was not only executory on the Part of *A.* but further executory on the Part of *B.* also, as if *A.* agrees to deliver the Horse, and *B.* agrees to pay him ten Pounds a Month after the Delivery, there *A.* must not only tender the Horse, but deliver it without Payment of the Money, and has only an Action for the Money, because the Contract is so made, as to be executory on the Part of *B.* after the Delivery of the Horse by *A.*

If *A.* contracts to deliver four hundred Quarters of Barley in a Year at sixteen Shillings by the Quarter: These being cumbersome Goods may be delivered at several Times, and if *A.* tenders any Part, as suppose twenty Quarters, if he be not paid, he may refuse to deliver it, but if *A.* delivers it, he waves the Benefit of present Payment, and the Tender or Delivery of Part does not excuse him from delivering or tendering the rest; for he must compleat his Bargain in order to compel *B.* to perform his Part.

If

If a Bargain be made which is executed in Part by one Side, and executory on the other, the antient Rule was, that if that Part which was executory became impoſſible by the Act of God, it was an Excuſe for not performing the Bargain. As if *A.* ſold a Horſe to *B.* in his Stable, and the Horſe died, that excuſed the Delivery, and *A.* ſhould have an Action of Debt for the Remainder of his Money. But this muſt be underſtood with this Diſtinction, that if *A.* ſtipulates to deliver the Horſe, there if the Horſe dies, this will excuſe the Delivery of the Horſe, but will not intitle *A.* to the Money, becauſe he was to have the Money upon the Delivery. But if *B.* gave Earneſt for the Horſe, and by Contract was immmediately to take the Horſe, there though the Horſe died, the Loſs was to *B.* and ſo *A.* was intitled to the Money.

So if Tenant for Life or in Tail ſells *B.* an hundred Trees for an hundred Pounds, if there be no Time appointed by the Contract to fell them, *B.* is to fell them immediately, that is ſo ſay, in convenient Time; and there if *B.* fells fifty of the Trees, and Tenant for Life or Tail dies, their Executors ſhall have the whole Money, becauſe it was the Laches of *B.* that he did not take the full Benefit of his Part of the Bargain. But if by the Contract *B.* is not to cut down the Trees till a future Day, and Tenant for Life or in Tail dies before that Day comes, the Bargain is become impoſſible by the Act of God, without any Default of *B.* and therefore the Executors of Tenant for Life or in Tail ſhall not have

18 Edw. 4. 5, 6, 21. Bro. Debt, pl. 165. Appor. pl. 25: Contract pl. 26.

have the Money, for *B.* hath not *Quid pro Quo*. But if the Bargain was, that *B.* ſhould have two Years to cut down the Trees, and *B.* fells fifty Trees, and *A.* Tenant for Life dies, the old Books ſay, that this Contract being executed in Part by *B.* and *B.* having Liberty to take the Trees for ſome Part of the Time, that the Executors of *A.* may have an Action againſt *B.* for the whole Money. But it ſeems to be under this Diſtinction, that *B.* ſhould have Time to cut for two Years if *A.* lived ſo long; there *B.* having a Liberty to cut, muſt do it in the Life-time of *A.* or elſe it will be his Laches, and he will be obliged to pay the whole Money. But if *A.* undertakes in all Events that *B.* ſhall have two Years to fell down the Trees, the Executors of *A.* ſhall not have an Action of Debt for the Money, unleſs all the Trees be cut down. But it ſeems that the Executors of *A.* may have a *Quantum meruit* againſt *B.* if he has cut down more Trees than he has paid for, from the natural Juſtice of the Thing, that *B.* is not to receive the Property of *A.* without Payment. And where the Bargain becomes impoſſible, it is as if there was no Bargain at all, and therefore the Price here muſt be ſet at a reaſonable Value. So if *B.* has his Action againſt the Executors of *A.* for any Damage he has ſuſtained by not injoying the free Benefits of the Contract. But theſe Damages are only to be recovered where *A.* did not acquaint *B.* with the particular Intereſt he had in the Land, *viz.* for his Life, and yet undertook that *B.* ſhould

have

have two Years Time for cutting down the Wood.

If *A.* ſells and delivers the Horſe of *C.* to *B.* for ten Pounds, and *C.* retakes the Horſe out of the Stable of *B.* yet *A.* ſhall have an Action againſt *B.* for this Money; For the Bargain was executed by the Delivery of the Horſe, and perhaps *A.* might have defended his Poſſeſſion againſt *C.* though *B.* did not; and therefore the Sale is good, for *B.* had a poſſeſſory Property by the Delivery, and *B.* is left to his Action upon the Caſe againſt *A.* for his Fraud in ſelling him what was another Man's; and it ſeems no Action lies againſt *A.* till *B.* has paid his Money.

If *A.* ſells Lands to *B.* for an hundred Pounds, and the Lands are evicted by *C.* by Title paramount, yet *A.* ſhall recover the Money; becauſe *B.* had the Poſſeſſion tranſferred to him, and took ſuch a Title as was approved by his Lawyers, and it might be that he took knowingly a defective Title in Abatement of the Price, and *B.* hath Remedy only on the Covenants in his Purchaſe Deeds. 2 Danv. Abr. 507. (C.) pl. 1. and ſee 2 Rol. Abr. 429. (O.) and the Notes there.

But if *A.* ſells his Ward to *B.* and the Ward is evicted by Title paramount, *A.* has no Remedy for the Money. For *A.* doth not ſell the Body of the Ward (for a Freeman cannot be ſold) but only the Right he has to the Wardſhip, and if he has no Right he ought to recover no Money.

BOOK the FIRST,

CHAPTER the SECOND.

Secondly, We ſhall treat of the Action of Debt upon Deeds and Leaſes.

THE firſt Thing we ſhall begin with is the Action of Debt for Rent. And here the firſt Thing to be obſerved is the Difference between the Rent reſerved on a Leaſe for Life and a Leaſe for Years: *The* former at Common Law was not recoverable in an Action of Debt, but the latter was. The Reaſon of the Difference was this, that whenever a Man took a Leaſe for Years he was Bailiff to the Lord, and was accountant for the Profits at a certain Sum, and therefore as Bailiff was ſubject to an Account where the Sum due was uncertain. So where the Leſſee agreed for a certain Sum he was ſubject to an Action of Debt. And theſe Leaſes being formerly of a ſhort Continuance, and ſubject to the Power of the Freeholder, if the Leſſor had not Remedy upon the Chattels wherever he found them, he would have no Remedy at all, and when Chattels came by the Devices of the Leſſee to be ſecreted, they gave the Remedy againſt the Body of the Debtor. But all feudal Rents aroſe from Plough Services, or Eſcuage, turned into a

Sum

Sum certain; and there was no Remedy *extrá Feodum*, for if there had been a Remedy for the original Services *extrá Feodum*, the Tenant might have been eternally obliged to the Services though he had renounced the Eſtate, and by that Means alſo he and his Heirs might have been compelled to the corporal Services, which would reduce the Freeman to the State of a Villain; and therefore there was no Remedy for theſe corporal Services, either of Plough or Shield, but upon the Land. And afterwards when the Plough Services were turned into Rents, and the uncertain Eſcuage into a Sum certain, which made the Socage Tenure, there was then no other Remedy for the Rent than was before for the Service, and that was on the Land itſelf, and not by Debt upon the Perſon; as the Lord had no Remedy out of his Feud by any Action whatſoever. Hence it was, that if the Lord died, and the Tenant was in Arrear to him, the Executor of the Lord had no Remedy for ſuch Arrears, becauſe the Executor was not intitled to feudal Duty, to which the Lord was not intitled as to a Debt; for the Executor was the Repreſentative only *quoad* the Debts of the Lord; and the Heir had no Arrear due to him, becauſe he was only intitled to the Services incurred in his own Time, no more than he was obliged to ſerve his ſuperior Lord but from the Time that he entered into his Feud. And in Analogy to this they expounded all Rent-Charges to be Freeholds, during the Continuance of their Eſtates, for Conformity of Conſtruction; but after the Eſtate of Freehold was determined by the Act of God, they conſtrued the Ar-

Co. Litt 162. 4 Co. 49. a. 11 H. 6, 14, 15.

rears as Debts, becauſe after the Freehold became diſcharged from the Duty, the Perſon muſt be charged, otherwiſe there would have been no Remedy, but during the Time that the Freehold continued Debtor, no Perſon was charged in Caſe of the Rent-Charge any more than in Caſe of the Rent-Service.

18 H. 6. 11. 21 H. 6. 15. 2 Danv. Abr. 490. F. N. B. 121. C. Rol. Abr. 595.

It is alſo to be known, that where a Man makes a Leaſe for Life, reſerving Rent, though the Land is the Debtor during the Continuance of the Freehold, and nothing elſe, becauſe there is no Contract for Payment to the Party but only out of the Freehold; yet becauſe ſuch Freehold muſt determine, it was in Contemplation between the Parties, at the Time of the Contract, that there might be an Arrear at the Determination of the Leaſe, and therefore they conſtrued the Acceptance of ſuch Leaſe to be a Contract to pay the Rent after the End of the Leaſe, which obliges the Perſon, though, during the Continuance of the Leaſe, the Leſſor could not reſort to the Land itſelf, unleſs he had provided otherwiſe by Covenant. For they looked upon the *Reddendum* in a Leaſe for Life not to imply a Contract for Payment while the Land remained the Debtor, for the Contract was only feudal, and the feudal Contract, while it continued, never charged the Perſon but the Land only; but for the Arrears after the Determination of the Eſtate the Contract could not be feudal, and therefore was conſtrued to be perſonal, or elſe the Leſſor could not have his intire Rent. Upon the ſame

same Reason they construed the *Reddendum* in a Lease for Years during the Term not only feudal but personal, because the Rent being a Consideration for the holding of the Term, it was not considered merely as a feudal Duty, but also as a Contract for receiving the Profits, and if it had not been so considered, the Lords could not have had Remedy for their Arrears from such precarious Possessors as the Lessees for Years were.

But if there be Lord and Tenant by a certain Rent, and the Tenant dies without Heirs, the Rent in Arrear, the Lord shall never have an Action of Debt for the Arrears against the Executors of the Tenant, because the Tenant had an Estate that might by Possibility last for ever, and therefore the Tenant accepting the Feud did not make his Person liable to such Rent, nor by the Acceptance of the Rent is there any Implication, that the personal Property of the Tenant or his Executors should be liable after the Fee was determined; nor did the Lord contract with such a Prospect as to have an Action to recover the personal Property of the last Heir in the Estate. As where the Lessor contracts to have his whole Rent during his whole Lease for Life, and by Consequence that the personal Property of the Lessee should be liable after his Death; and when the Lessor had no other Estate to resort to, there was no Foundation to make such Constructions on these Contracts, as were made on limited Estates, in Behalf of the Reversioner; for the Contract with the Reversioner was a certain fixed 4 Co. 49. a.

Contract, to which the Reverſioner might go back, in order to found his Action: But in Caſe of Lord and Tenant, the Lord of the Signiory could never go back to the perſonal Contract of the firſt Feudary, and yet that muſt be, if he would found his Action of Debt for the Arrears after the Determination of the Tenancy as upon a perſonal Contract.

F. N. B. 121. d. 4 Co. 48. b. and 49. a. 9 H. 6. 41.

But if a Man grants an Annuity to a Parſon and his Succeſſors, and the Parſon reſigns his Living, yet he ſhall have an Action of Debt for his Arrears, though the Annuity continues to his Succeſſors; and the Reaſon is becauſe this Contract is originally perſonal and not *feudal*, nor in the Nature of a feudal Contract, where the Lands are the Debtor; and therefore ſince it is originally perſonal, though he muſt have a Writ of Annuity during his continuing to have the whole Annuity in him, that he may have Judgment for the Annuity, and a *Scire facias* upon that Judgment, yet when his Title to the Annuity ceaſes by his Reſignation, there he cannot have a Writ of Annuity, but the Contract being only perſonal and not feudal, nor in the Nature of a feudal Contract, he ſhall recover the Arrears of ſuch Annuity by Action of Debt, for there is the ſame Reaſon that this perſonal Contract whereby he recovers a ſingle Duty ſhould create a Debt, as any other Contract whatſoever.

Roll. Abr. 595.

If a Man makes a Feoffment in Fee reſerving a Rent for Years, the Feoffor ſhall have an Action of Debt for ſuch Rent in the Nature

ture of a Rent-Charge granted for a Term for Years, and ſince Rent-Charges upon a Term were conſtrued to be Contracts perſonal as well as feudal, therefore they conſtrued the Rent-Charges for Years in the ſame Manner. For when the Contract was made in the ſame Form, it was underſtood to be the Intention of the Grantor of ſuch Rent-Charges to ſubject himſelf to the ſame Obligation.

Thus we ſee that the Lords had no Remedy for the Arrears of the Rent-Services due on an Eſcheat or Deſcent of the Tenancy, nor had the Executors of the Lord or Leſſor any Remedy for the Arrears due at the Time of their Death, while the Tenancy, Leaſe, or Gift in Tail continued, on which ſuch Services were reſerved. But at Common Law, if there had been a Leaſe for Life made rendring Rent, after the Leaſe for Life was determined, the Leſſor in ſuch Caſe might have an Action of Debt for the Arrears, as is ſaid, becauſe upon the Determination of the Leaſe the Land itſelf was no longer Security for the Rent, and therefore they allowed the Action of Debt to the Leſſor, that by the Judgment and Execution thereon he might bind and ſeiſe the Chattels of the Leſſee wherever they could be found.

F. N. B. 121. c. Roll. Abr. 595.

So if the Leſſee at will be, and he runs in Arrears, the Leſſor may recover them in an Action of Debt, but the Leſſor in his Declaration muſt ſet forth an Occupation by the

Co. Litt. 57. b. Salk. 209. Clift 237. Saund. 202, 203. Vent. 41. 108. Lutw. 313. Ld. Raym. 170. Comb. 255. 4 Bac. Abr. 366.

Tenant at Will, when he entered, and how long he enjoyed, which he is not obliged to do in his Declaration on a Leaſe for Years, and the Reaſon of the Difference is, that the Leaſe at Will is determinable at the Will of the Leſſee as well as of the Leſſor, and therefore if the Tenant forbears to occupy, that is an Evidence of the Determination of his Will, ſo that the Rent ariſes only from the Occupation, which is the Evidence of the Continuation of the Contract. But the Leſſee for Years is bound by his Contract during the Term, whether he occupies or not, and therefore is liable to the Rent reſerved while the Term ſubſiſts; but if the Leſſee continues the Poſſeſſion after the Term is expired, and thereby becomes Tenant at Sufferance, it ſeems the Leſſor could have no Action of Debt at Common Law, becauſe the Tenant occupied by Wrong, and not upon the Foot of any Contract to ground an Action. But if the Leſſor receive any Rent after the Leaſe is expired, this is Evidence of a Contract to make a Tenant at Will under that Rent, but before Payment of any Rent, the Tenant at Sufferance continues the Cuſtody of the Land for the Leſſor, or as a Diſſeiſor, at the Election of the Leſſor. That is to ſay, if the Leſſor requeſts ſuch Tenant to deliver up the Poſſeſſion and he does not, then he is a Diſſeiſor, but if no ſuch Requeſt be made, he cannot be ſaid to be a Wrong-doer if he keeps the Poſſeſſion, for that is only to keep the Poſſeſſion for his Leſſor againſt Strangers. And where the Tenant is a Diſſeiſor, the Leſſor muſt make an actual Entry to make the Tenant

Tenant liable to the mean Profits in an Action of Treſpaſs; becauſe he that is in Poſſeſſion has the Profits, ſince the Profits follow the Poſſeſſion upon all Diſſeiſins, and therefore a Re-entry muſt be made to re-veſt the Freehold, and, in Conſequence, the mean Profits thereunto belonging.

But now by 4 *Geo.* 2. *c.* 28. and 11 *Geo.* 2. *c.* 19. every Tenant for Life, or Years, and every Perſon deriving under them, holding over after the Determination of ſuch Leaſe, ſhall pay to the Leſſor, or to ſuch Perſon to whom the immediate Reverſion of ſuch Lands expectant on the Determination of ſuch Leaſe ſhall belong, double the yearly Value of the Lands ſo detained, for ſo long a Time as the ſame ſhall be detained, to be recovered by Action of Debt or Treſpaſs.

And by 8 *An.* *c.* 14. or 17. it is enacted, That any Perſon having any Rent in arrear upon any Leaſe for Lives, may bring his Action of Debt for the ſame in the ſame Manner as he might have done, in Caſe ſuch Rent were due and reſerved upon a Leaſe for Years. Note; this Act by expreſs Words has not given the Action of Debt to the Executors of the Leſſors, for the Recovery of ſuch Arrears of Rent during the Continuance of the Eſtate, but by the 32 *H.* 8. *c.* 37. that Caſe is provided for.

Co. Litt. 162. b.
2 Danv. Abr. 492. pl. 8.

But if *A.* had leaſed to *B.* for the Life of *B.* rendering Rent, *A.* might at Common Law have an Action of Debt for Recovery of the Arrears.

4 Co. 49. a. b.
F. N. B. 121. c.
Rol. Abr. 595.

Arrears, for by the Death of *B.* the Rent in Arrear becomes no more than a ſimple perſonal Duty, for which neither the Lands or the Chattels on it were Pledges; for *A.* could not even diſtrain the Chattels of *B.* after the Determination of the Eſtate, and therefore thoſe Arrears were at Common Law recoverable in an Action of Debt, or elſe *A.* had been without Remedy for them. But now if *A.* makes a Gift in Tail or Leaſe for Life to *B.* of Lands reſerving Rent, or if *A.* grants a Rent-Charge in fee to *B.* in both theſe Caſes, the Executors of *A.* and *B.* ſhall recover the Arrears of the ſaid Rent-Services or Rent-Charges reſpectively by the 32 *H.* 8. *c.* 37. either by Diſtreſs or Action of Debt. *There* is however this Difference in reſpect to thoſe Remedies given by that Statute, that the Diſtreſs runs with the Land, and Charges it with the Arrears in the Hands of any Perſon claiming by or from the Tenant in whoſe Hands they incurred: But the Action of Debt lies only againſt the Tenant himſelf who ſuffered the Arrear to incur.

Co. Litt. 162. b.

Co. Litt. 162. 4 Co. 50.

Upon this Act it has been held, that where the Teſtator himſelf has by his own Act loſt his Remedy for the Recovery of the Arrears, there his Executors can have no Remedy by Diſtreſs, or Action of Debt for ſuch Arrears; for the Statute gives the Remedy only in as large and ample a Manner as the Teſtator himſelf might recover. Therefore if there be Lord and Tenant, and the Rent is in Arrear, and the Lord grants away the Signiory, the Arrears are loſt; becauſe by the granting away

away the Signiory, the Tenant is in the Fealty of another, and the Distress, which accompanies the Fealty, is consequently in the Grantee, and so the Grantor is without Remedy at Common Law, and therefore his Executors are without Remedy by the Act.

So it is if *A.* be seised of a Rent-Charge in Fee, or for Life, and the Rent is in Arrear, and *A.* grants over the Rent, and dies, the Arrears are lost; for the Executors have no Remedy by the Act where the Testator had none himself, as in this Case, *A.* had not, because the Right of distraining was by the Grant transferred to the Grantee; and *A.* in this Case had no Action of Debt at Common Law for the Arrears due before the Grant made, because that were to make the Rent a Chattel Interest and a Freehold at one and the same Time. Vaughan 40. 4 Co. 49. 50. b. Co. Litt. 162. b.

But where such Rent-Charge is extinguished or determined by Act in Law or of the Party, or by the Effluxion of Time, there *A.* may have an Action of Debt at Common Law, for the Arrears. As if, in the former Case, *B.* the Father of *A.* had granted the Rent-Charge to *A.* in Fee, and it had been in Arrear, and *B.* had died, and the Rent-Charge had been thereupon extinguished by the Descent of the Tenancy, *A.* might have charged the Executors of *B.* in an Action of Debt for the Arrears. Because the Inheritance of the Rent being actually determined, and the Freehold of the Lands no more a Debtor for the Arrears of Rent, then the Arrears are to be considered 4 Co. 49. a. 2 Danv. Abr. 491.

conſidered as a ſimple perſonal Duty, and like other perſonal Duties recoverable in an Action of Debt. Beſides in this Caſe there was an original Right in *A.* to make this Annuity chargeable on the Perſon of *B.* or a Rent chargeable on the Land, and the Deſcent of the Land, which, by Act of Law, determined both the Rent and the Annuity, has not taken away the Election as to the Arrears, becauſe there muſt be ſome Act of *A.*'s, in a Court of Record, to determine his Election.

4 Co. 49. a. So if *A.* had only been Tenant for the Life of *B.* or for his own Life; in the former Caſe, if *B.* had died, or *A.* had ſurrendered the Rent to *B.* in both theſe Caſes, *A.* might, at Common Law, have had an Action of Debt for the Arrears; becauſe the Freehold being determined, the Arrears are conſidered as a perſonal Duty, or a Chattel, for they cannot be conſidered as a Freehold, becauſe that were to ſuppoſe the Rent to have a Continuance, which it has not in this Caſe. And, for the former Reaſon, in the other Caſe, where *A.* is Tenant for his own Life, and dies, his Executors at Common Law might have an Action of Debt againſt *B.* for the Arrears incurred in the Life of *B.* But, in the former Caſe, where *A.* is Tenant for the Life of *B.* and *A.* dies before *B.* the Rent being in Arrear, the Executors of *A.* had no Remedy for the Arrears at Common Law, becauſe the Rent in this Caſe is not determined, and while the Freehold continues, you cannot make the ſame Rent, both a Chattel Intereſt for the Arrears, and a Freehold for the growing Rent; for the Arrears are but Part of the

the ſame Rent which is ſtill a Freehold. But now by the Statute 32 *H.*8. *c.*37. the Executors of Tenant *pur auter vie* may have an Action of Debt for the Recovery of thoſe Arrears, during the Life of *Ceſtuy que Vie*, for ſo the Statute is to be conſtrued to give it any Operation; becauſe the Executors, as has been ſaid, might at Common Law have had an Action of Debt, for the Arrears, upon the Death of the *Ceſtuy que Vie*, which determining the Freehold, the Arrears are to be conſidered as a perſonal Duty comprehended in one ſingle Payment.

And in thoſe Caſes, as well at Common Law as on the Statute, the Action of Debt lies againſt the Tenant of the Land, who ſuffered the Arrears to incur, and his Executors and Adminiſtrators. And therefore, where the Huſband was ſeiſed of Lands in the Right of his Wife, out of which *J.* had a Rent-Charge during his Life, and *J.* died, the Rent being in Arrear, the Executors of *J.* ſhall recover the Arrears againſt the Huſband only, who took the Profits of the Lands when they became due, becauſe the Profits of the Lands which ought to have gone in Satisfaction of the Rent-Charge were received and diſpoſed of by the Huſband, and therefore if the Diſcharge and Satisfaction of the Arrears had incurred before the Coverture, the Action muſt have been brought againſt the Huſband and Wife, for in that Caſe the Huſband is chargeable for the Debt of the Wife who took the Profits when the Arrears incurred. Co. Litt. 162. a.

For

Co. Litt. 47. b. 162. b. 4 Co. 49. Noy 43.

For the Arrears of *Nomine pœnæ* the Leſſor or Grantee at Common Law might have had an Action of Debt, and conſequently his Executors or Adminiſtrators, becauſe it is but a ſingle perſonal Duty upon each Non-performance; but the Lord could not have an Action of Debt for Relief, and yet the Executor of the Lord might. The Reaſon is, becauſe the Relief was only a Sum paid by the Heir of the Tenant, for a Reſtitution to the Lands, and if not paid formerly, the Heir could not enter into Poſſeſſion; but after, as the Rigour of the feudal Law came to be mitigated, an Entry was permitted to the Heir into the Lands deſcended on him, and a Diſtreſs was given to the Lord, and the Statute of *Magna Carta* made theſe Reliefs certain. But when the Lord died, and the Relief could not be taken by Diſtreſs, the Executors of the Lord had an Action of Debt *ex neceſſitate*, and this ſeems to be a Conſtruction of *Magna Carta*; for if the Lord had made the Relief certain by Agreement, before the making of *Magna Carta*, he might have had Diſtreſs, for it is a feudal Duty, and he might have had an Action upon the Contract: But when the Statute came and did not give an Action of Debt to the Lord, they conſtrued the Relief, as it was before, as a feudal Duty: But after the Death of the Lord, when it was no more a feudal Duty, and yet was aſcertained by the Statute; they conſtrued it to be a perſonal Duty; as if the Lord made it certain in his Life-time by a particular Contract or Agreement.

If

If a Man leaſes for ten Years, rendering Rent to him and his Heirs, upon Condition, that the Leſſee ſhall have a Fee doing ſuch an Act; though in this Caſe the Leſſee have a Fee by Relation from the beginning on Performance of the Condition, yet before the Condition performed, the Leſſor may have an Action of Debt for the Rent, becauſe the Leſſee has but a Chattel Intereſt till the Condition performed, and therefore the Rent is recoverable thereon as on a Leaſe for Years. Co. Litt. 217. a.

BOOK the FIRST,

CHAPTER the THIRD.

The next Thing to be conſidered is, in what Caſes the Action of Debt lies for Rent, either where the Leſſee parts with the Term, or the Leſſor with the Reverſion.

IT is already obſerved, that at Common Law the Action of Debt lay only for Rent reſerved on a Leaſe for Years, and as the 3 Co. 22. b. Moor 351.

Leſſor

Leſſor had that Remedy, ſo upon his Death the Heir on whom the Reverſion deſcended was intitled to it, to recover the Rent incurred in his Time, and ſo is the Grantee of a Reverſion, becauſe the Rent is incident to the Reverſion, and the Deſcent or Grant thereof does not alter the Nature of the Rent, and as by the original Leaſe or Contract it was reſerved to the Leſſor, his Heirs or Aſſigns, they ſtand upon the Foot of that Contract intitled to the ſame Remedy as the Leſſor himſelf was; and this was in Order to follow the Chattels of the Leſſee wherever they were found, by the Judgment and Execution in the Action of Debt.

10 Co. 129. And it ſeems that the Executors of the Leſſor ſhall have an Action of Debt for the Arrears incurred in his Life-time, where the Reverſion deſcends to the Heir, but where he grants the Reverſion, the Rent in Arrear at the Time of the Grant is loſt; for the Grantee cannot have it, for he is only intitled to Rent due after the Grant, nor can the Grantor recover the Arrears by Diſtreſs, becauſe that follows the Fealty of the Tenant which is now due to the Grantee; nor by Action of Debt; becauſe the Contract on which that is grounded is by the Act of the Leſſor determined. But the Executors ſhall have the Arrears upon the Deſcent of the Reverſion to the Heirs, becauſe there is no Alteration in the Contract by the Act of the Party, and therefore the Arrears which are a perſonal Duty in the Teſtator, and, if he had lived, would have been brought into his perſonal Eſtate,

Eſtate, are as ſuch recoverable by his Executors, and if this had been a Leaſe for Life and a Rent reſerved upon it, the Executors ſhall have the Arrears by the Action of Debt on the Statute 32 *H.* 8.

If Tenant in Dower make a Leaſe for Years reſerving Rent, and then takes an Huſband, and the Rent is in Arrear, and the Huſband dies, it has been adjudged that the Executors of the Huſband ſhall have the Rent and not the Wife. And there ſeems to be no other Remedy for the Recovery of them but by Action of Debt, for theſe Arrears being a Chattel and veſted during the Coverture, it belongs to the Huſband who has the Dominion over the perſonal Eſtate of the Wife, and it ſhall go to his Executors who repreſent his perſonal Property and are to collect it. So if a *Feme Covert* be Leſſee for Life rendring Rent, which is in Arrear at the Death of the Wife, Debt lies againſt the Huſband becauſe he took the Profits of the Land. Moor 7.

If Tenant for Years aſſigns all his Intereſt in his Term, reſerving an annual Rent, it has been doubted whether an Action of Debt lay for each Gale or Payment as it became due, or whether the Aſſignor was to wait till the Allen 57. Co. Litt. 292. b. Bro. Diſtreſs, pl. 7. Debt, pl. 39. 2 Lev. 80.

Latch 211. Freem. 218. Cro. Jac. 487. Moor 126. Stra. 405. 2 Bac. Abr. 106. Raym. 222. Vent. 242, 272. 2 Lev. 280. Carth. 161. 2 Mod. 174. Freem. 218. 10 Mod. 69, 70, 162. 12 Mod. 7, 23. 2 Vern. 421, 422. Ld. Raym. 99, 737. 2 Stra. 1089, 1221. Swinb. 390. See Cro. Jac. 487. Moor 126. and ſee 19 Vin. Abr. 112. pl. 12. *in the Notes.*

Term was expired, becauſe where the whole was aſſigned, there was no Reverſion, and conſequently the Duty reſerved was more properly a Sum in Groſs than a Rent. As in a ſingle Bill to pay 100*l.* at Five ſeveral Days, the Obligee has no Action for any Part till the laſt Day be paſſed, becauſe the Action muſt purſue the Contract which is for the intire Sum of 100*l.* and therefore the Action cannot commence while there is a Day for Payment of a Parcel. But the latter Reſolutions are that the Rent is recoverable every Year. For though it be not a Rent in the genuine Signification of the Word, yet it is ſo in Regard it ariſes in Conſideration of the Perception of the Profits of the Land which return annually.

Moor 549. Cro. Eliz. 637, 651. Rol.Rep.234, 598. Inſt. 317. a. Litt. 151. b. 152. a. Leon. 315. Lev. 22. 2 Jon. 1. Raym. 11. Keb. 1.

If *A.* be Leſſee for thirty Years, and leaſes to *B.* for Twenty-eight Years at thirty Pounds a Year, and *A.* deviſes Twenty-eight Pounds of this Rent to *C. D.* and *E.* to each a third Part; each of the Deviſees may have an Action of Debt for his Share of the Rent, for they cannot diſtrain for it as a Rent, becauſe the Diſtreſs goes along with the Reverſion, and that is in the Poſſeſſion of the Executors of *A.* and therefore there would be no Remedy if they could not recover in an Action of Debt.

Cro.Eliz.797. Leon. 208. Styl. 31, 32. Ow. 42. 2 Rol. Rep. 523.

It will be neceſſary here to ſhew in what Caſes an Action of Debt lies upon a Covenant. And here all the Books agree that if the Covenant be to pay a certain Sum of Money at a certain Day, the Covenantee may have Action of Debt or Covenant at his Election.

Election. For where a Man covenants to pay, he is as much a Debtor at the Day as if he had by Bond obliged himſelf to the Payment, and therefore the Action of Debt lies. And the Law is alſo ſettled, that where the Covenant is to pay Money, though the certain Sum be not mentioned in the Deed, but is to be reduced to a Certainty by ſome ſubſequent Act, yet the Action of Debt lies upon the Covenant, as if *A.* covenants with *B.* to pay him ſo much Money as he ſhall ſpend in repairing ſuch a Ship, and *B.* expends an hundred Pounds therein, he ſhall recover it in an Action of Debt, becauſe wherever the Certainty of the Sum can be demanded and alledged in the Declaration, the Covenant creates an Obligation, and that Obligation is the Foundation of this Action. [*And here it may be added, that the Plaintiff ſhall never recover a greater Sum than he has laid in his Declaration, but if he demands a greater Sum than is due, or can be proved to be due, it ſeems notwithſtanding he ſhall recover ſo much as he can prove to be due on the Trial.*] So where a Suit was depending between the Vicar of *B.* and *A.* concerning the *Modus decimandi*, which concerned all the Pariſhioners of *B.* and *C.* a Pariſhioner agrees and promiſes by Deed to pay his Proportion of the Charges of the Suit; *A.* may have an Action of Debt for *C.*'s Proportion, on this Deed. And in ſuch Caſe *A.* muſt alledge the Sum in Groſs expended by him, and aver in his Declaration that, for ſuch a Sum expended in certain, *C.*'s Proportion of the whole, the Action was brought; becauſe according to this Declaration there appears a

Danv. Abr. 498. 2 Jones 184. Skin. 17.

3 Lev. 429. 2 Danv. Abr. 496. pl. 21. See Styl. 31, 133. Raym. 14, 222. 2 Lev. 80.

certain Sum due, and conſequently recoverable in an Action of Debt. But where the Jury are to aſcertain the Debt or Damages, there the Action of Debt is an improper Remedy, and Covenant is proper upon ſuch Deeds.

And here it may be further obſerved, that where an Annuity is granted for Life, or in Tail, or in Fee, that a Writ of Annuity muſt be brought, and no Action of Debt or Covenant lies for it; for though the Annuity is merely perſonal, yet being conſtituted by Grant, and by Words uſed in paſſing Freehold Eſtates, they therefore gave an Action as permanent as poſſible, and one peculiar Remedy.

Bro. Annuity pl. 17. And when Judgment was given for the Recovery of ſuch an Annuity, a *Scire facias* iſſued out on ſuch Judgment, to compel the future Payments if they were denied, and therefore the *Scire facias* gave Execution of the Annuity recovered and eſtabliſhed by the Judgment, as often as it was denied. But where ſuch Annuity was conſtantly paid to the laſt

Bro. Annuity pl. 6. Payment, and the Annuity determines; there after the Determination of the Annuity, an Action of Debt, and no Writ of Annuity, lies for the Arrears, becauſe ſuch Arrears are but as one ſingle perſonal Duty, as is already mentioned. But after Judgment had in a Writ of Annuity, a *Scire facias* may be brought for the Arrears due on the Determi-

Bro. Annuity pl. 23. nation of the Annuity, but this *Scire facias* muſt name them as Arrears and not as a continuing Annuity, becauſe ſuch Arrears are a Part of the ſame Annuity for which the Judgment

Judgment was obtained. But if there had been no Judgment, there muſt have been an Action of Debt brought for the Recovery of thoſe Arrears. If an Annuity be granted for Years, the Grantee may either have a Writ of Annuity to eſtabliſh the Annuity upon the Foot of the Grant, and a *Scire facias* afterwards; or elſe he may have an Action of Debt for each ſingle Payment, as he may upon the Grant of a Rent-Charge for Years, becauſe being made in the Form of a Chattel, it gives the Grantee the double Remedy. Where the Annuity is granted by way of Freehold or Chattel, it is enough for the Plaintiff to alledge Seiſin generally *Virtute Doni aut conceſſionis*; becauſe the Grantor is eſtopped to ſay that there was no Seiſin contrary to his Grant, though the Grant be by Deed Poll; for if he admits the Grant he cannot controvert the Seiſin, ſince the Grant gives a ſufficient Right to a perſonal Duty. But if the Annuity was claimed by Preſcription, there he muſt alledge the actual Seiſin by the Hands of the Grantor or his Heirs; becauſe he does not ſhew any Grant by which he is ſeiſed or intitled, and therefore the actual Seiſin and Payment is the only *Indicium* of the Right.

Bro. Annuity pl. 34.

Co. Ent. 48, 49.

BOOK the FIRST,

CHAPTER the FOURTH.

Thirdly, An Action of Debt lies on Matters of Record or Judgments of Courts of Juſtice.

THE Labour or Actions of Men may be reduced to a certain Value by the Agreement of the Parties themſelves, like any Commodity; and the Price in ſuch Caſes is the Debt. So the Act of Law, that is the Judgments or Acts of Courts of Juſtice, may reduce Mens Acts of any Sort to a certain Value, whether they be Acts of Benefit or of Injury and Injuſtice. And when a certain Value is ſet upon ſuch Action, it creates a Debt to the Party to whom it is by Law appointed, for, though there be no actual Contract, yet the Debt ariſes *ex quaſi contractu*; for as it is common Juſtice to repair Injuries, ſo when the Law has ſettled the Compenſation of the Injury, the Law ſuppoſes a Contract engaging the Party to make a Compenſation. Beſides, the Law being the common Rule to ſettle all Diſputes, when once the *Quantum* of the Damage or Injury is adjuſted by the Deciſion of one of its Courts, that Deciſion or Judgment

Judgment ought in right Reaſon to create a Debt, as much as if the Parties themſelves had choſen Arbitrators to determine between them, who had awarded a certain Sum of Money, which, as has been already obſerved, might be recovered by an Action of Debt. 43 Ed. 3. 2.
Hence it is, that if a Man recovers Damages in a real Action, as in a Writ of *Ayel*, *Coſinage*, or Entry *ſur diſſeiſin*; or if he has Judgment in an Action of Waſte, by which the Place waſted and treble Damages are recoverable, he may have an Action of Debt for the Damages. But if a Man recovers Arrears of Rent-Service or Rent-Seck in an Aſſize, he ſhall not, it ſeems, have an Action of Debt for them upon the Judgment, for in this Caſe he recovers the Rent of the Freehold *per viſum recognitorum*, and he can have no perſonal Action to recover a Right of Freehold; but for Damages in the Aſſize he may have an Action of Debt on the Judgment, becauſe they are a perſonal Duty aſcertained by the Judgment. So if a Man recovers Damages in an Action of Treſpaſs, or has Judgment in an Action of Debt, he may ground an Action of Debt on either of theſe Judgments, in one to recover the Debt, in the other the Damages; becauſe the Judgment of Law has ſettled the Demand of the Plaintiff, and that Determination muſt be complied with, and therefore by the firſt Judgment the Defendant is under an Obligation to pay the Sum awarded to the Plaintiff.

2 Danv. Abr. 198.
Rol. Abr. 600.
43 Ed. 3. 2. Sed 9 Ed. 4. 50. b. to the contrary, by Littleton.
Hob. 206.
pl. 260.
Hutt. 11, 32.
Noy 22.
Mo. 886.
pl. 1344.
Brownl. 51.
Cro. Car. 539. pl. 3.
Jones 430. pl. 2.
March 13. pl. 133.

An Action of Debt lies for an Amerciament in a Court Baron; for wherever the Amercia-
Rol. Abr. 599.

ment is a Duty laid by the Steward of the Court, it creates a Debt to the Lord; becauſe every Tenant by coming into the Manor, is ſuppoſed to engage to do the Service of the Manor Court, or to ſubmit to the Affeerment of his Fellow Suitors of that Manor, ſo that theſe Amerciaments being aſſeſſed for the Delinquency or Default of the Tenant, are therefore recoverable in an Action of Debt, and not by Diſtreſs, that the Juſtice of the Demand may appear in the King's Courts.

Salk. 209, 439. cont. Sid. 330. See 8 Mod. 103, 233. Vent. 72. Salk. 202, 404. Sid. 65, 105, 151, 180.

This Action of Debt lies in the ſuperior Courts, on a Judgment given in the inferior Courts, and in the inferior Courts on a Judgment in the ſuperior Courts, for it is a Debt throughout the whole Kingdom; and in theſe Caſes if the Defendant pleads *Nul tiel Record*, the King by *Certiorari* ſhall order the Record to be brought into Chancery, and from thence by a *Mittimus* it ſhall go into the Court where the Cauſe is depending, and ſo the Iſſue ſhall be tried; for the King by his Great Seal can command and bring up the Proceedings of all his Courts into his Chancery, and from thence, for the Adminiſtration of Juſtice, may diſtribute them into his other Courts.

Sid. 236. 2 Danv. Abr. 499. pl. 9. Keb. 827. Lev. 153. Raym. 100. 4 Mod. 247. 158. Show. 1202.

And this Action of Debt may be brought on a Judgment in the Common Pleas or King's Bench, pending a Writ of Error to reverſe the Judgment in the King's Bench; becauſe

2 Vent. 321. Show. 36. Comb. 50, 77. Carth. 3, 36. Ld. Raym. 151, 553, 794, 811, 879, 1200,

though

though the Writ of Error is a *Superſedeas* to the Execution in the Common Pleas, yet while the Judgment is unreverſed the Debt is due, and conſequently the Party ought to have his Action for it. But if the Plaintiff has a Judgment on the Action of Debt brought on the original Judgment, *Quære*, whether the Writ of Error pending is not a *Superſedeas* to the Execution on the ſecond Judgment as well as on the firſt.

But though an Action of Debt lies upon a Judgment pending a Writ of Error to reverſe it, yet the Judges gave all poſſible Diſcouragement to ſuch Proceedings as vexatious and unreaſonable, and therefore do not hold the Defendant to bail in ſuch Caſes. But in thoſe Caſes, if the Action of Debt be brought pending the Writ of Error, the Plaintiff ought to declare on the ſpecial Matter; that is to ſay, on a Judgment in this Court, and of its being removed by Writ of Error, and that the Judgment is ſtill *in robore perfectionis ſuæ*, or, as they ſay, *in pleno robore, prout patet per Recordum inde in Banco Regis*; and ſo the Law ſeems now to be ſettled.

7 Mod. 62, 140. Mod. 79. 4 Mod. 314. 5 Mod. 68. Ld Raym. 47, 405, 117, 1295. Stra. 632. 2 Stra. 867, 1186. 3 Lev. 375, 396. 4 Mod. 241. See Ld. Raym. 437, 865, 1215, 1413. 8 Mod. 108. 10 Mod. 276, 277.

11 Mod. 135, 174, 196, 256. 12 Mod. 440. Comyns 162. Barnes 90, 103, 110. 2 Barnes 99, 100, 102, 106, 122. Stra. 188, 682. Andr. 357. 2 Stra. 871. contrary to Barnes 110. and ſee Hardw. 70. 2 Barnard. K. B. 154. 2 Stra. 977. 2 Barnard. K. B. 450. 2 Stra. 1106. Andr. 356. 2 Ventr. 261. 2 Danv. Abr. 499. pl. 10.

This Action of Debt was the only Remedy to recover the Debt due on the Judgment after the Year and Day, at Common Law; becauſe if the Party had ſlept on his Judgment 2 Inſt. 469.

ment a Year and a Day, the Debt was presumed to be satisfied, and therefore he was put to his Original to recover the Debt on the first Judgment. To remedy this, the Statute of *Westminster* the Second, Chapter 45. gives the *Scire facias* to recover the Judgment in personal Actions.

BOOK the FIRST,

CHAPTER the FIFTH.

The next Matter of Record the Action of Debt lies upon, is the Recognizance and Statute.

And first of the Statute Merchant.

Rol. Abr. 599. THE Statute Merchant is always under the Seal of the Party, and has all the Solemnities of an Obligation at Common Law, and for the Debt contained in it, an Action of Debt lies.

But no Action of Debt lies on a Statute Staple, because that is not under the Seal of the Party, and therefore no Obligation at Common

Common Law aroſe on which this Action could be maintained. And the Statute which introduced this Security, has not given the Party an Action of Debt, but has given him other Remedies; which are already treated of.

So an Action of Debt lies on a Recognizance, on the 23 *Hen.* 8. *c.* 6. becauſe this Recognizance having the Seal of the Party to it may be made uſe of as an Obligation at Common Law.

Moor 811. pl. 1097. 2 Rol. Abr. 466. Brownlow's Entries 222. See 8 Geo. 2. c. 25.

Debt alſo lies on a Recognizance taken in Chancery, or before the Lord Mayor of *London*, for the former Reaſon. It alſo lies upon the Tenor of a Recognizance taken in Chancery, and certified under the Great Seal in the King's Bench; becauſe the Tenor of the Recognizance, being under the Great Seal, is of the ſame Notoriety and Validity, as if the original Contract under the Seal of the Conuſor had been produced.

Rol. Abr. 600. Danv. Abr. 498. Dyer 369. b.

An Action of Debt lies on a Recognizance of Bail; for as at Common Law a Man might acknowledge a Debt of his own before the King's Juſtices, the Creditor chuſing this Method to prevent Delay and Charge in proving ſuch Debt; ſo a Man might enter into a Recognizance for the Debt of another; that is, to engage himſelf for the Debt proviſionally, in caſe Judgment ſhould be obtained againſt the Defendant and he not pay the Sum recovered. And this Acknowledgment or Recognizance of the Bail, was firſt admitted in

2 Danv. Abr. 498. Rol. Abr. 897. in order to deliver Perſons out of Priſon, that were bound to anſwer for any Miſdemeanor, before any Conviction of the Fact, while they were yet preſumed to be innocent. Hence theſe Acknowledgments created a perſonal Obligation to Payment at the Common Law, and the Party might either have a *Scire facias* againſt the Bail, and if he had Judgment in the *Scire facias*, he might have an Action of Debt on ſuch Judgment, and obtain a ſecond Judgment and take out Execution thereon: Or when the Plaintiff has obtained Judgment againſt the Principal, after a *Capias ad ſatisfaciendum* taken out and *Nihil* returned, he may take his Action of Debt on the Recognizance againſt the Bail, whether ſuch Recognizance be in the King's Bench or Common Pleas; and the Caſe in *Raymond* 14. to the contrary, is not Law. Indeed when you proceed by Action of Debt, in the firſt Inſtance on the Recognizance, the Proceſs in this Action is different in the King's Bench and Common Pleas. In the King's Bench, the *Capias* lies againſt the Bail in Proceſs, becauſe in the King's Bench the Charge againſt the Principal was ſuppoſed to be built on ſome criminal Proſecution, and therefore when the Principal is let out on Bail, the Bail, who is his Undertaker, is liable in the ſame Manner the Priſoner was, to the *Capias*. But in Debt on a Recognizance in the Common Pleas no *Capias* lies in Proceſs, becauſe by the Tenor of the Recognizance the Bail bound his Lands and Chattels only, but where the Plaintiff recovers Judgment in the Action of Debt on the Recognizance

Rol. Abr. 600, 897. 2 Danv. Abr. 498.

Recognizance, the Judgment affects both Body, Lands, and Goods of the Defendant, who was Bail in the original Action, and ſtands upon the ſame Footing with all other Judgments, and the ſame Execution lies for the Satisfaction of the Debt.

If a Man recovers in Debt, and has the Party in Execution, and he eſcapes, it has been doubted whether he ſhall have an Action of Debt on that Judgment after the Eſcape. But as the Body in Execution is neither conſidered as Payment or Satisfaction, but merely a Pledge to compel the Payment of the Debt, as if the Defendant died in Execution, this was no Satisfaction for the Debt, and therefore in this Caſe the Judgment being unſatisfied an Action of Debt lies on it, and the rather as no one ought to take Advantage by his own wrong. But where the Plaintiff is ſatisfied by an Execution executed, there he can have no Action of Debt on the Judgment which appears by the Record to be ſatisfied as the Law directs. Except only, where the Execution that iſſued was fruitleſs by *Nihil* returned, there indeed the Plaintiff may have Debt on the Judgment, becauſe it is not as yet ſatisfied. So where only Part of the Debt is ſatisfied; as if the Judgment was for a thouſand Pounds, and the Plaintiff had taken out three ſeveral *Elegits*, upon one of which the Sheriff had returned that he had levied five hundred Pounds, the Plaintiff may have an Action of Debt on the Judgment for the Reſidue: For the Statute of *Weſtminſter* the Second, that gave the *Elegit*, does not, by that Remedy, exclude

Sid. 184. Lev. 92. See 2 Ld. Raym. 1451.

exclude the Plaintiff from any other Remedy, which he had at Common Law, but gave a further Remedy than there was at Common Law, and therefore, as Part of the Debt became unſatisfied by the *Elegits* already iſſued, he may reſort to his Action of Debt on the Judgment. But if the Sheriff by the *Elegit* had extended the Defendant's Freehold, for Satisfaction of the Debt, there it ſeems the Plaintiff cannot have an Action of Debt on the Judgment, becauſe the Extent of the Freehold is a Satisfaction for the Debt, and the Plaintiff taking the *Elegit* againſt the Freehold, has now determined his Choice to take his Debt by the Perception of the Profits of the Lands extended only, until the Debt is ſatisfied.

Rol. Abr. 601. Cro. Eliz. 600. to the contrary.

And where a Man chuſes a *Scire facias* on a Recognizance, and has Judgment on the *Scire facias*, he cannot have an Action of Debt on the Recognizance, neither before or after the Execution taken out on the Judgment in the *Scire facias*, becauſe now the Debt due on the Recognizance is changed into the Judgment, and that Judgment is only a Security for the Debt; and if the Action of Debt lay upon the Recognizance after the Judgment in the *Scire facias*, then would the Defendant be doubly vexed and charged for the ſame Debt. Moreover the Action of Debt in ſuch Caſe would be fruitleſs to the Plaintiff, becauſe there he could only recover Judgment, and that he has already by the *Scire facias*.

But

But if a Man has Judgment on a *Scire facias*, he may bring Debt on that Judgment, in any other Court, and afterwards chuſe on which Judgment he will take out Execution, becauſe both Judgments are in equal Force, and conſequently the Party may take Benefit of either of them. Cro Eliz. 817. See 6 Rep. 44. b. Hardr. 128. 2 Lev. 92.

BOOK the SECOND,

CHAPTER the FIRST.

Of the Declaration in the Action of Debt.

Under this Head is to be conſidered,

Firſt, **The Declaration in Debt on ſimple Contracts and Leaſes.**

Secondly, **The Declaration on Judgments, Statutes and Recognizances.**

AND here in the firſt Place it is plain, that in Declarations in this Action againſt the Party himſelf contracting, the Plaintiff muſt charge

charge the Defendant in the *Debet* and *Detinet*; becauſe where the Party contracting refuſes to pay, he is in Strictneſs of Speech a Debtor for the Price agreed on, and is guilty of an unjuſt Detention, and therefore the original Writ ſays, *Quod debet et injuſte detinet.* But if a Man borrows a Horſe of me, or any other Chattel, except Money, and refuſes to return it, I may have an Action of Debt againſt him in the *Detinet* only; for in Propriety of Speech a Man is only Debtor to me for the Price agreed on for any Chattel, but if the Chattel itſelf be by the Agreement to be returned *in ſpecie*, he can only be ſaid to detain it from me unjuſtly.

3 Leon. 260.
4 Leon. 46.

For outlandiſh Money not made current by Proclamation, the Action runs in the *Detinet* only; becauſe the *Quantum* of the Value of that Money, in the current *Species* of the Kingdom, is unſettled; and there the Defendant cannot be ſaid to owe ſo much, or any particular Sum whatſoever, when the very Action is to decide the *Quantum* of what is owing, and which muſt be determined by a Jury: But the Plaintiff in ſuch Caſe muſt only alledge the Damage by a Detention, and therefore the Action of Debt for ſuch Money, is in the *Detinet* only.

2 Danv. Abr. 502.
5 Co. 32. b.
Perk. ſect. 86.

In all Actions of Debt brought by or againſt Executors, the Writ runs in the *Detinet* only. For in the Action by an Executor, under that Character, it cannot be in the *Debet* and *Detinet*, becauſe a Man cannot properly be ſaid to owe to the Plaintiff, only where the Plaintiff has the

the Property himſelf in the Thing in Demand. It is therefore repugnant, that an Executor ſhould alledge that the Defendant owes him the Money, when the Executor only recovers as a Truſtee for another. The Injury for the Nonpayment does not ariſe to the Executor or Adminiſtrator, but to the perſonal Eſtate of the Teſtator or Inteſtate. So where a Man is ſued for a Debt as Executor or Adminiſtrator to another, becauſe he is not ſued as a Party to the Contract, but as the Repreſentative of the Debtor, and on Account of the Aſſets which he poſſeſſes in Right of ſuch Repreſentation, to charge him in Debt, would be to ſuppoſe he had a Property in the Aſſets of the Teſtator or Inteſtate. Reg. 140. a.

But where the Debtor binds his Heir, the Creditor muſt charge the Heir in the *Debet* and *Detinet*; becauſe the Inheritance of the Anceſtor which creates a *Lien* upon the Heir, is poſſeſſed by the Heir *Jure proprio*, and not *alieno*, as the perſonal Eſtate is by the Executor, and therefore he muſt be ſaid to owe what he muſt pay, and therefore if the Charge ſhould be againſt the Heir in the *Detinet* only, he may demur generally to the Declaration, becauſe it is a material Part of the Charge. But if the Heir ſhould not take Advantage upon the Demurrer, but give an iſſuable Plea, which is found againſt him, the Defect is cured by the Verdict by Force of the Statute. Sid. 342, 379, 643. Lev. 224. 2 Keb. 290. Plowd. 441. N. Na. Br. 119. 5 Rep. 36. a. Dyer 344. Hob. 282. 3 Lev. 74. See Lev. 130.

Yet in the Caſe of an Executor, there is this Exception, that where he is charged for Arrears of Rent incurred after the Death of

the Teſtator, the Action is in the *Debet* and *Detinet*, becauſe the Rent being a Retribution for the Profits of the Land, the Perception of the Profits by the Executor makes him on that Account liable to that Retribution, and thereby an actual Debtor for the Rent. *But thoſe Points relating to the Heir and Executor, and the Manner of charging them, are now fully treated of under the Head of Obligations and Executors.*

3 Lev. 74. Lev. Entr. 52. Cliſt 289.

Only here it will be neceſſary to obſerve one Thing more; that if you would ſue the Executors for Arrears incurred in the Life-time of the Teſtator, and alſo for Rent due after his Death, you muſt do it by two different Actions; for you cannot charge him in the ſame Declaration, for the former, in the *Detinet* only, and for the latter in the *Debet* and *Detinet*; becauſe then there muſt be different Judgments in one Action, the Judgment in the former Caſe being *De bonis Teſtatoris*, and in the latter, *De bonis propriis*; and therefore a Demurrer to ſuch a Declaration has been held good.

If Baron and Feme be ſued on an Obligation entered into by the Wife whilſt ſole, they muſt be charged in the *Debet* and *Detinet*. For the Huſband by the Intermarriage poſſeſſes all the Chattels of the Wife *Jure proprio*, and on that Account has made himſelf chargeable with her Debts, and therefore not like the Caſe of an Executor, who poſſeſſes the Aſſets *Jure alieno*, and has himſelf no Property in them.

BOOK

BOOK the SECOND,

CHAPTER the SECOND.

BUT in order to treat more extenſively of the Declaration in Debt, it will be neceſſary, to ſet down ſuch Things as are of courſe to be obſerved in the Declaration, whether the Action be brought by the Leſſor himſelf, his Heir, Executor or Aſſigns.

Secondly, What Things are peculiar to the Declaration where it is brought by the Heir, Executor or Aſſigns.

And thirdly, Where it is brought by one or the other of them againſt the Aſſignee of the Term.

Firſt, What Things are neceſſary in general to be obſerved in the Declaration.

And here in the firſt Place we muſt obſerve, that the *Venue* muſt be laid where the Lands lie, where the Action for Rent is brought in the *Debet* and *Detinet*. For where there is a Tenure and Relation between Landlord and Tenant, the *Pares* where the Land lies are Judges of the Controverſy relating to the Land; but where the Action is brought merely on the Contract, as againſt an Executor in the *Detinet* only for Arrears incurred in the Life of the Teſtator, there the Action is tranſitory, as 2 Lev. 80. 3 Keb. 135.

on all other Contracts, and therefore the *Pares* of the County, where the Defendant is taken up, are the proper Judges of it.

Yelv. 208. Bulſt. 151. 2 Danv. Abr. 508. pl. 1.

Secondly, Where the Declaration varies from the Entry of the Plaint, the Plaintiff cannot have Judgment. As if the Entry of the Plaint be, *in placito Debiti*, and the Plaintiff declares for an Annuity, and that the Defendant *ſubſtraxit annualem Redditum*, this is repugnant and contrary to the Entry of the Plaint, for the Judgment on the Annuity is different from the Judgment in Debt for Rent, for in the former the Plaintiff ſhall recover the Arrears incurred pending the Writ, but in the latter he ſhall recover the Sum due at the Time the Action was brought.

Dyer 14. a. Kelw. 65. b. Sid. 423. Vent. 41, 108. Sand. 202, 203. Clift 237. Co. Lit. 57. b. Mod. 3. 2 Keb. 545. March 20. Hetl. 54. 2 Danv. Abr. 508. pl. 6. 3 Danv. Abr. 216. pl. 6. Lev. 263. Raym. 175. Sid. 405. 2 Keb. 467, 470.

Thirdly, In a Declaration for Rent upon a Leaſe at Will, the Plaintiff muſt not only ſet forth the Demiſe, but alſo aver and prove the Entry and Occupation of the Leſſee, becauſe the Occupation is the Evidence of the Continuance. But in Debt for Rent upon a Leaſe for Years, though it is uſual in the Declaration to ſay, *Virtute cujus* the Leſſee entered, yet the Plaintiff is not obliged to prove ſuch Entry and Occupation of the Leſſee, nor is ſuch Entry, though alledged in the Declaration, traverſable, becauſe the Action is grounded on the Contract, which, by proving the Leaſe, the Plaintiff proves to ſubſiſt during the Term, and conſequently the Rent to be due, unleſs the Defendant proves it to be paid, or ſhews that he could not legally enter and occupy. But if there be an old Tenant who holds

holds over, the new Tenant muſt evict him, becauſe he by the new Leaſe has the legal Poſſeſſion of the Land in him, and therefore can only puniſh the Treſpaſs of the old Tenant holding over; and therefore where the new Tenant fears the old Tenant will hold over his Term, it is the ſafeſt Way for the new Leſſee to make the Leſſor covenant to deliver the Poſſeſſion at the Commencement of the new Leaſe, and for a quiet Enjoyment againſt the old Leſſee; and where ſuch covenant is, and the Leſſor ſues for Rent where a new Leſſee could not enter and occupy, it ſeems a Court of Equity will give Relief in ſuch Caſes*. But in the Caſe of a Leaſe at Will, where in the Declaration the Occupation is not averred, the Defendant muſt take Advantage of it on a Demurrer, for the Fault is cured after a Verdict; for where the Jury finds the Rent due which the Plaintiff has declared for, the Court may reaſonably preſume that the Tenant was poſſeſſed during that Time. In Debt for Rent the Plaintiff declares, that he let to the Defendant in the ſixteenth Year of the King, for ſo long as both Parties pleaſed, and that the Defendant entered and occupied for one Year then next following, and for the Rent in Arrear for the ſaid Year ending the eighteenth Year of the ſaid King, the Plaintiff brought his Action; to this it was demurred, becauſe the Rent was demanded for the eighteenth Year of the King, and it is not ſhewn that the Tenant enjoyed but for the ſeventeenth Year of the King; the Court held clearly that this would be good after a Verdict, but upon the Demurrer the Court doubted in this Caſe, be-

See 10 Mod. 69, 70, 162. 12 Mod. 7. Ld. Raym. 746. 2 Stra. 776. Salk. 209. Lutw. 313. Ld. Raym. 28, 170. Comb. 255.

* See now 4 Geo. 2. c. 28 and 11 Geo. 2. c. 19.

Ventr. 108. 2 Keb. 734.

cauſe the Words, for the ſaid Year, might reaſonably confine the Demand of the Rent to one Year only, during which the Defendant was alledged to have occupied.

2 Ventr. 129. Noy 55.

Fourthly, It is to be obſerved, that when a Leaſe is made reſerving Rent payable at two Feaſts in the Year, or quarterly, every diſtinct Gale or Payment is a ſeveral Debt, and therefore the Leſſor may ſue for it, and declare for any Gale without taking Notice of or ſhewing how he has been ſatisfied for the preceding Gale. As if I declare on a Demiſe made the twenty-fifth Day of *March*, the fourth of the King, ſo long as both Parties pleaſe, at ten Pounds by the Year, to be paid quarterly, and that the Defendant entered and occupied, and continued poſſeſſed till *Chriſtmas* then next following, and for fifty Shillings one Quarter's Rent, ending at the ſaid *Chriſtmas* Day, I bring my Action, I ſhall recover without ſhewing how the two precedent Quarters were paid, becauſe each Quarter's Rent is a diſtinct Debt, and no more is ſaid to be due than that Quarter ending at *Chriſtmas*. But if I had demanded in this Caſe fifty Shillings for Rent behind for two Quarters ending at *Chriſtmas*, this Declaration had been ill; for there I ſhew two Quarters to be due, and demand but Part, and therefore I ſhall recover none. Otherwiſe, the Defendant would be expoſed to a new Action for the Reſidue, and that would encourage and create Multiplicity of Suits. Beſides, the Declaration is abſurd and repugnant of my own ſhewing, as five Pounds are due for two Quarters, and not fifty

Cro. Car. 137. 2 Danv. Abr. 237. pl. 10. 2 Vent. 129. Jones 242. 3 Mod. 41. See 10 Mod. 7, 69, 70, 277, 324. 11 Mod. 34. 12 Mod. 81. Ld. Raym. 816. 2 Lev. 4. 2 Keb. 743, 804.

fifty Shillings only, unleſs I ſhew that the other fifty Shillings are paid. Thus if a Man declares on a Leaſe rendring ſeventy-four Pounds the firſt of *September*, and demands one hundred Pounds for a Year and a Half due at ſuch a Day, this is ill, becauſe the Rent for a Year and a Half is one hundred and eleven Pounds, and therefore he demands leſs than appears to be due, and does not ſhew how the Reſidue was ſatisfied. So it ſeems if a Man declares for Part of a Gale of Rent, he muſt ſhew how the Reſidue of that Gale was diſcharged; for if ſuch Declaration was allowed, the Defendant would be doubly vexed for one intire Debt. Cro.Car. 104.

In Declarations for Rent the Plaintiff ought to ſet forth at what Day or Feaſt the Rent became due; for the Declaration upon a Demurrer will be held too general, where it only mentions ſo much Rent to be due to the Plaintiff. Though in ſome Caſes ſuch a general Declaration will be cured by a Verdict; as where *A.* declares on a Leaſe for three Years rendring Rent at *Michaelmas* and *Lady-day*, and declares for Rent in Arrear for two Years, without ſhewing at what Feaſts due. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was too general, for as the Rent is reſerved at two Feaſts, the Plaintiff ought to ſhew at which of them it became due, but in regard it appeared that two of the three Years only were expired, it was held certain enough after a Verdict. But this ſeems a Circumſtance peculiar to this Caſe. But if the Plaintiff de-

5 Mod. 212, 213. Sand. 282. 2 Keb. 576.

clares for ſeveral Gales of Rent, and in the ſumming them up makes his Demand for more than is really due to him, yet he ſhall have what is really owing to him; becauſe the Plaintiff may releaſe the Surplus, as the Thing in Demand is diviſible. *See the Title Traverſe.*

BOOK the SECOND,

CHAPTER the THIRD.

The next Thing to be conſidered is, What Things are peculiar to the Declaration, where the Action is in the Name of the Heir, Executor or Aſſignee of the Reverſion.

Thom. Ent. 118, 119.

IF an Action of Debt be brought by the Heir of the Leſſor on a Leaſe made by the Anceſtor, the Heir in his Declaration muſt ſet forth, that his Anceſtor was ſeiſed in Fee and demiſed to the Plaintiff, or that the Reverſion and Rent deſcended upon him, becauſe the Plaintiff muſt ſhew all that is neceſ-

ſary

ſary to make himſelf a Title to the Thing in demand, and if he does not alledge the Seiſin in Fee in the Anceſtor, it does not appear by the Declaration that the Plaintiff in all Events is intitled to the Rent; for if the Leſſor had only a Term in the Land, the Executor, who is the Repreſentative as to the Chattel Intereſt, would be intitled to the Rent. So if a Father be ſeiſed *pur auter Vie*, and leaſes to *A.* for Years at ten Pounds Rent and dies, and *C.* as Heir and ſpecial Occupant, brings Debt for Rent againſt *A.* for Rent incurred after the Death of the Leſſor, he muſt alledge the Seiſin of his Father for the former Reaſon, and alſo aver the Life of the *Ceſtuy que vie*, to ſhew his Title continuing, becauſe the Rent being a Retribution for the Land, he could not be intitled to the Rent unleſs his Title to the Land continues. So if *A.* be ſeiſed in Fee, and leaſes at a certain Rent, and the Reverſion and Rent by meſne Aſſignments come to *B.* if *B.* brings Debt for this Rent, he muſt ſet forth the Seiſin in Fee in *A.* and the ſeveral Aſſignments of the Reverſion, becauſe theſe are neceſſary to make out his Title, and the Validity of theſe Aſſignments being Law ought to be ſet forth to the Court to judge of, and not left to the Jury, as they muſt be if only produced on the Trial and not alledged. This at leaſt ſeems to be the ſureſt Way, though the more prolix; for though ſuch Defect in the Declaration might be cured after the Verdict for the Plaintiff, becauſe the Jury could not find for him unleſs theſe meſne Aſſignments were regularly proved,

Sand. 250. 2 Danv. Abr. 541. pl. 7. 3 Danv. Abr. 198. pl. 14. Cart. 208.

proved, yet upon a Demurrer it ſeems the Declaration would be ill.

But where an Executor brings an Action of Debt for Rent, there is a Difference in the Declaration where the Demand is for Rent incurred in the Life-time of the Teſtator, and where for Rent in the Executor's own Time. In this laſt Caſe he ought to ſet forth what Eſtate the Teſtator had in the Land at the Time of the Demiſe made, becauſe otherwiſe it does not appear in all Events that the Executor is intitled to the Rent, becauſe if the Leſſor was ſeiſed of an Inheritance or Freehold, the Rent incurred after his Death would belong to his Heir, and not to the Executor; and therefore the Executor ought to ſay, "*That whereas the Teſtator was poſſeſſed, &c.*" But if the Executor declares for Rent incurred in the Life-time of the Teſtator, he need not ſet forth what Eſtate the Teſtator had, but only ſay, "*That whereas the Teſtator demiſed;*" becauſe whether Freehold or a Term, the Arrears due in the Teſtator's Life-time belong to the Executor, and therefore he may only ſet forth the Contract. But in all Caſes, whether the Action is brought by the Leſſor, his Heirs or Executors, againſt the Aſſignee of the Leſſor, the Plaintiff need not ſet forth the meſne Aſſignments of the Term to the Defendant, becauſe they do not lie within his Knowledge, and cannot in Reaſon be expected from him, and therefore it is ſufficient for the Plaintiff to ſet forth the Demiſe to the firſt Leſſee, "*whoſe Eſtate and Intereſt in the Premiſſes the Defendant has by Aſſignment, and*

"*was*

Aſton's Ent. 214. 2 Inſt. Cler. 349, to the contrary. Raſt. Ent. 176. pl. 17.

Sid. 297. Lev. 190. 2 Keb. 87. Cro. Eliz. 22, to the contrary.

"*was thereof poſſeſſed, &c.*" And as the Plaintiff cannot come at the meſne Aſſignments of the Term to ſet them forth or give them in Evidence, it ſeems that the Proof of the Aſſignee's Poſſeſſion and Occupation, is ſufficient to charge him with the Rent, becauſe the Plaintiff's Caſe from the Nature of the Thing is capable of no other Proof.

In the laſt Place it is to be obſerved, that, if there be any Arrears of Rent due at the Time of the Leſſor's ſelling his Reverſion, theſe Arrears are loſt at Law. The Aſſignee cannot have them, for by the Grant to him the growing Rent only paſſes. The Grantor cannot recover them, becauſe they can only be recovered as a Rent-Service, and he has parted with the Reverſion to which they belong. But Equity will relieve in this Caſe, for this is a Debt in Conſcience and ought to be paid. Bro. Debt, pl. 93. Vaughan 40.

BOOK the SECOND,

CHAPTER the FOURTH.

The next Thing to be conſidered under this ſecond general Head, is the Declaration in the Action of Debt, on Judgments and Recognizances.

2 Inſt. Cler. 368, 369.

IN this Declaration you are in general to recite the Judgment, the Court wherein it was obtained, the Debt recovered, and the Damages given, "*as appears by the Record*," and that the Judgment is in full Force and not reverſed, and that the Plaintiff hath not had his Execution for the ſaid Debt or Damages. For as the Judgment is the higheſt Evidence of the Debt, there need nothing to be mentioned in the Declaration but the Judgment, for nothing is neceſſary to prove the Debt but the Record of the Judgment. So in Debt on a Recognizance taken in Chancery, the Declaration only ſets forth, that on ſuch a Day, "*before the King in his Chancery*," the Defendant acknowledged to owe to the Plaintiff an hundred Pounds to be paid on ſuch a Day. But if the Recognizance taken in Chancery be

2 Inſt. Cler. 385, 386.

be under the Great Seal, and certified ſo in the King's Bench, and there declared on, then you muſt make Mention of the Writ, by which it is certified, and conclude the Declaration with a Tenor of the Recognizance in the very Words thereof.

But in theſe Declarations on Judgments and Recognizances, there are two Things more particularly to be obſerved.

In the firſt Place, the *Venue* muſt be laid in the County where the Judgment was obtained; as if *A.* has Judgment of Debt in the City of *Norwich*, and he brings an Action of Debt on that Judgment in the Courts above, the *Venue* muſt be laid in *Norwich*. So if *A.* has Judgment for a Debt or Treſpaſs in *Eſſex*, and after brings an Action of Debt on that Judgment, in the Common Pleas, the *Venue* muſt be laid in *Eſſex*, for the Record of the Judgment makes the Action local, and the original Debt or Treſpaſs is not the Ground of the Action, but the Record of that Judgment, which has created a new Debt, and which remains in *Eſſex*. So it is if a Recognizance be taken in any of the Courts at *Weſtminſter*. But if it be taken (as the Practice is) before any of the Juſtices of the Common Pleas, at their Chambers in *London*, there is no perfect Recognizance till it is returned into Court, and there recorded, and when entered it is a Recognizance, from the firſt Acknowledgment, and binds as a Record from that Time, and in this Caſe where two Things are

Hob. 196.

Hob. 195, 196. 6 Mod. 42. 2 Salk. 659. Ld. Raym. 966. 2 Lutw. 1287. See 8 Mod. 2, 290. 11 Mod. 4. 45, 53, 223, 224, 253. Ld. Raym. 84, 757, 819. 1141, 1170.

are neceſſary to make it a Record, which are done in two different Counties, the *Venue* may be laid in either *London* or *Middleſex*. But if upon ſuch Recognizance taken before a Judge of the Common Pleas in *London*, and inrolled afterwards in the Common Pleas, the Conuſee brings an Action of Debt in the King's Bench, and declares as upon a Recognizance taken in the Common Pleas, this Declaration will be bad upon the Plea of *Nul tiel Record*, becauſe there is a Variance between the Recognizance that is declared on and that produced, becauſe it was taken before a Judge at his Chambers, and not in Court, and therefore the Declaration ought to have ſet forth, that the Recognizance was taken before a Judge at his Chambers in *London*, "*Which ſaid Recogni-*"*zance the ſaid Judge, ſuch a Day in ſuch a*"*Term, delivered by his own Hands to be in-*"*rolled there of Record.*" But if a Recognizance be entered generally, as taken before the Chief Juſtice of the Common Pleas, it will be underſtood to have been taken in Court, and then the Action muſt be brought in *Middleſex*.

Hob. 196.

The next Thing to be obſerved in Declarations, is, that they muſt always conclude *ad Damnum* of the Plaintiff, and not with a *Per quod actio accrevit*, &c. as you do for Rent. And in this they agree with Declarations on Bonds; for whenever the Debt ariſes merely by the Judgment or Obligation, and not any Thing *debors*, you lay a Non-peformance of the Obligation, and conclude with laying the Breach *ad Damnum*; but where the Debt ariſes, not

not by the Obligation alone, but alſo by ſome Matter *debors*, there you lay the Matter *debors* in your Declaration, and conclude, *Per quod actio accrevit*; becauſe the Debt does not ariſe merely on the Obligation itſelf, but accrues upon ſomething ſubſequent thereto. Therefore if a Man obliges himſelf in a Sum of Money, which is *Debitum in præſenti*, he muſt lay a Refuſal to pay, *ad Damnum*. So if a Debt be *in præſenti* though *ſolvendum in futuro*, you lay the Refuſal to pay *ad Damnum* of the Plaintiff. But if a Man makes a Leaſe for Years reſerving Rent, that is both *Debitum in futuro*, and *Solvendum in futuro*, and therefore you lay in the Declaration, a Refuſal to pay at the Time, and ever after, *Per quod actio accrevit, &c.* becauſe the Rent was not a *Debitum* or *Solvendum*, by the Leaſe, but by the Enjoyment, either real or preſumed, and the ſubſequent Non-payment; beſides, in the Declaration for Rent to purſue the Contract, and intitle yourſelf to the Action, you muſt ſay it was *a retrò et inſolut'* at the Day, and then if you ſay afterwards, that the Defendant *recuſavit ſolvere, et adhuc recuſat*, as you do in the Action of Debt on the Bond or Judgment, that would be Tautology or Surpluſage, and bad on a ſpecial Demurrer.

BOOK the SECOND,

CHAPTER the FIFTH.

Of the Declaration againſt the Bail.

Cro. Car. 481. Jones 396. Rol. Abr. 779.

THE laſt Thing here to be conſidered of in this Place, is the Declaration againſt the Bail. And here it may be obſerved, that if Judgment be obtained againſt the Principal, you may proceed againſt the Bail either in Action of Debt or by *Scire facias*. But as the Bail is only liable in Caſe the Principal does not pay the Debt, or tender himſelf to Priſon, the Plaintiff, before he can be intitled to the Action of Debt on the *Scire facias* againſt the Bail, muſt take out a *Capias ad ſatisfaciendum* againſt the Principal, and have a *Non eſt inventus* returned, and this as well in the King's Bench as in the Common Pleas. Becauſe the Court having once had the Principal in Cuſtody, whom they deliver out upon Bail, they muſt endeavour by the *Capias ad ſatisfaciendum* to bring him in again before they ſuffer the Bail to be vexed, ſince he is legally in the Cuſtody of the Bail, till the Court reclaims him, and then the Bail is obliged to deliver him up to the Court or to ſtand in his Place. After the *Capias ad ſatisfaciendum* returned, you proceed againſt the

Bro. Ent. 210, 211, 212.

the Bail in the Action of Debt, and in this Declaration you recite the Recognizance of the Bail, the Process and the Judgment against the Principal, the *Capias ad satisfaciendum* issued against him, and the *Non est inventus* returned, and that the Principal has neither paid the Debt or rendered himself. If this Action be taken out against the Bail without any *Capias ad satisfaciendum* issuing against the Principal, the Bail may plead in Bar of the Action, and therefore in the Declaration against the Bail, the *Capias ad satisfaciendum* must be mentioned, and the *Non est inventus* returned thereupon.

Upon the Return of *Non est inventus* on the *Capias ad satisfaciendum* against the Principal, the Recognizance of the Bail is forfeited in Strictness of Law; yet in Regard the Bail's Recognizance is only to have the Principal forth-coming, or in Default thereof, that the Bail shall be charged with the Debt, for this Reason the Court *ex gratiâ* will upon Motion stay the Proceedings against the Bail, if the Principal be rendered before the Return of the second *Scire facias*; because the Plaintiff cannot have Judgment against the Bail till the Return of the second *Scire facias*. And though the Bail's Recognizance in Strictness of Law is forfeited, because the Principal was not forth-coming on the Return of the *Capias ad satisfaciendum*, yet since the Principal is forth-coming before Judgment had against the Bail, it appears to the Court that the Plaintiff hath the principal Pledge for his Debt, which is the Defendant's Body, and therefore no Salk. 101. Raym. 14.

Reaſon to proceed to Judgment againſt the Bail.

Salk. 101. In Analogy to this Practice, if the Plaintiff proceeds by Action of Debt againſt the Bail, the Court will allow a Render of the Principal, any Time before the Return of the Writ, and ſtay further Proceedings on the Action, for otherwiſe the Bail would be liable, though he has in effect performed the Condition of the Recognizance; becauſe by the ſtrict Rules of Law the Recognizance of the Bail is forfeited if the Principal be not rendered on the Return of the *Capias ad ſatisfaciendum*, and conſequently the Bail cannot plead a Render after the Return of the *Capias ad ſatisfaciendum* in Bar of the Action brought on the Recognizance.

Salk. 98. 8 Mod. 281, 282. The bare Render of the Principal is a Diſcharge, *in poſſe*, of the Bail; that is, ſuch a Diſcharge, as upon giving Notice to the Plaintiff he may get an *Exoneratur* entered upon the Bail-piece; but is not a complete and actual Diſcharge till an *Exoneratur* is entered. And the ſafe Way to proceed upon the Render, is to give the Plaintiff Notice thereof, and to get an *Exoneratur* entered on the Bail-piece. Otherwiſe if after the Render of the Principal, the Plaintiff ſhould proceed to Judgment againſt the Bail upon the *Scire facias*, the Court will not relieve the Bail on Motion, becauſe the Judgment on the *Scire facias* was regular, and therefore ought not to be ſet aſide on Motion. *Quære*, whether there is not Relief in ſuch Caſe by *Audita querela*?

Unleſs

Unleſs according to the Opinion in *Salkeld*, becauſe the Recognizance was forfeited by the *Non eſt inventus* returned on the *Capias ad ſatisfaciendum*, and the *Audita querela* will never look back to any Thing that happened before the Judgment. But at this Day it ſeems the Practice is ſo far altered, that Judgments regularly obtained are ſet aſide upon Motion, where Juſtice requires it on the one Part, and there is no Injuſtice done on the other by doing it, notwithſtanding the Diſtinctions taken in *Salkeld* and other Books and the former Courſe of Practice.

This Method of proceeding by *Scire facias* againſt the Bail, ſeems to be the moſt expeditious, and leaſt troubleſome, as it is free from the prolix Declaration which is neceſſarily required in the Action of Debt on the Recognizance. But as the Plaintiff can hold the Bail to ſpecial Bail in the Action of Debt, the Action of Debt may be the ſureſt Way when the Bail to the firſt Action becomes inſolvent, and the Principal is run away. And the Action of Debt may be likewiſe the beſt Way, where the Plaintiff finds that the Bail, or his Attorney, are watching the *Scire facias*, and intend to render the Principal on the Return of the ſecond *Scire facias*. But the Bail may not be ſo well prepared to ſurrender the Principal where an Action of Debt is taken out againſt the Bail, and he arreſted juſt before the Return of the Writ, and as the Principal muſt be rendered before the Return of the Writ againſt the Bail,

A. as Bail for *B.* enters into a Recognizance, that *B.* ſhall appear to any Action brought by *C.* in eight Days, and alſo that if *B.* be condemned in that Action and does not pay, that he will anſwer the Condemnation to *C.* *C.* brings his Action, and *B.* appears without the eight Days Warning, and *C.* obtains Judgment againſt *B.* and then takes an Action of Debt againſt *A.* on the Recognizance, and in his Declaration ſets forth his Suit againſt *B.* and the Judgment, and that *B.* has not ſatisfied it, but did not ſet forth the eight Days Warning, which *B.* was to have had to appear to the Action: And for this Reaſon, upon *Oyer*, the Declaration was held bad. Moreover the Recognizance was to pay the Condemnation Money only in an Action of which eight Days Warning ſhould be given, and therefore *B.* ought not to have it in his Power to hurt his Bail, a third Perſon, and a Stranger, by appearing voluntarily without ſuch Warning. Otherwiſe if the Agreement had been between *C.* and *B.* for then he might have appeared without ſuch Warning. *Volenti enim non fit injuria.* [*See the Hiſtory of the Common Pleas, Chap.* 3. *Title Bail.*] And where on a *Scire facias* againſt the Defendant as Bail for one *Gouch*, the *Scire facias* recited that Judgment was given againſt *Gouch* in Debt, and that he had not paid the Condemnation, nor rendered himſelf to the *Marſhalſea*, and the Defendant pleaded that the Principal was dead before the *Scire facias* was brought, and thereupon the Plaintiff demurred, becauſe he alledged not when the Principal died, nor that he died before the *Capias* awarded againſt him. The whole

Yelv. 52, 53. Cro. Jac. 45, 97. Danv. Abr. 683. pl. 3. Brownl. 85.

Cro. Jac. 97. 109, 165. Rol. Rep. 336, 450. Hob. 210. Moor 777.

whole Court for this Cause held the Plea to be ill. For if once upon the *Capias*, *Non est inventus* be returned, the Recognizance is forfeited, because there was Default in the Party; and though it be usual, if the Principal render his Body upon the first *Scire facias*, to accept it, yet that is of Grace, not of Necessity; therefore the Death at the Time of the *Scire facias* brought is not material, if he were alive at the Time of the *Capias* returned.

BOOK the THIRD.

CHAPTER the FIRST.

Of the Pleas and Issues in the Action of Debt.

And first, Of the Pleas and Issues of Debt on simple Contract.

THE General Issue is *Nil debet*; and this concludes either to the Country, and then the Trial is by a Jury, or with Prayer, and then the Defendant may be admitted to wage his Law, and then the Issue is determined Rastal's Entr. 152. pl. 5, 6.

ned by the Defendant's own Oath, and the Oath of his Compurgators ſwearing to his Credit.

Moor 49. pl. 148, 149. Dyer 219.

If the Contract be not truly alledged in the Declaration, the Defendant cannot ſhew, by Way of Plea, the Variance between the Contract alledged and the Contract really made; but muſt wage his Law, or plead *Nil debet*. As if the Plaintiff declares for a greater Sum, than the Contract was for, the Defendant cannot plead that it was for a leſs Sum, and traverſe the Contract in the Declaration, becauſe ſuch Pleas amount to the General Iſſue, and conſequently were bad at Common Law upon a general Demurrer, and ſince the * Statute for Amendment of the Law, they are bad upon a ſpecial Demurrer.

* 4 An. c. 16.

So if in Debt the Plaintiff declares on a Contract about buying an Horſe, the Defendant cannot plead that the Contract between him and the Plaintiff was for an Ox: Or where the Plaintiff declares that the Contract was between him and the Defendant only, the Defendant cannot plead that it was between him and the Plaintiff and another, and ſo traverſe the Contract in the Declaration. For that is a bad Plea, which puts the Matter of Evidence to the Court which ought only to be offered to a Jury. In Debt upon an *Inſimul computaſſet*, the Defendant pleads that he did not Account at all, this is a Traverſe of the Contract alledged in the Declaration, and therefore bad; becauſe if there was no Account ſtated there could be no Balance, and conſequently

Bro 226. pl. 14.

quently no Debt, and therefore the Defendant might have waged his Law, or pleaded *Nil debet per Patriam*, and given in Evidence that there was no Account ſtated, or at leaſt put it upon the Plaintiff to ſhew there was.

But in Debt on an Arbitrament, where the Submiſſion is by Parol, the Defendant may wage his Law, and therefore cannot plead no Arbitrament. For the general Rule is, that whenever the Inducement is neceſſary to the bringing of the Action, and the Defendant cannot wage his Law, he may traverſe the Inducement, but when the Defendant can wage his Law, he never can traverſe the Inducement though it be neceſſary to ſupport the Action. And the Reaſon of the Difference is this, becauſe the Law-Wager being the Defendant's Privilege, if that be taken from him, he may traverſe that Matter which takes it away, whereas if he has the Privilege he may wage his Law on the whole Matter, and then there is no Occaſion for him to traverſe any Part of the Declaration. The traverſing of a particular Part of the Declaration was a Privilege given to the Defendant to put a ſingle Point in Iſſue, the better to attaint the Jury, when he might otherwiſe take the whole upon his Conſcience: Therefore if Debt be brought for the Sale of an Horſe, or on a Parol Submiſſion to an Award, the Defendant can never traverſe the Award or the Sale, becauſe he might have avoided the whole upon his own Oath. But when the Plaintiff by his Action ouſts the Defendant of his Privilege, every Inducement by which it may

Leon. 252, 253. Cro. Eliz. 69, 201. 2 Leon. 98. Cro. Eliz. 168, 169.

be avoided is material to the *Gist* of the Action, and therefore will make a special Issue of itself, since it tends to hinder the Plaintiff from the general Issue, which he might take on his own Oath. For the Plaintiff must lay the Matter in the most particular and determinate Manner before the Jury, when he is to resort to the Jury only.

Hence it is that *Non demisit* is a good Plea upon a Lease for Years, as well as *Nil debet*. Hence in an *Assumpsit*, where Fraud is suggested, so that the Defendant cannot wage his Law, *Non assumpsit* is a good Issue.

Hob. 106. Leon. 853. But where the Consideration is executed, there the Consideration cannot be traversed alone, because it is not a substantive Fact, that is the Foundation or Grounds of the Action. As if a Man in Consideration of the Delivery of a Horse promises to pay ten Pounds, the Delivery of the Horse would not enduce the Action, since that would have been the *Gist*, if there had been no Promise from the Defendant, and consequently that is not in this Case the Foundation of the Plaintiff's Action. Where the Consideration is executed, you cannot traverse the Consideration by itself, because it is passed and incorporated and coupled with the Promise, and if it were not then passed, it is *Nudum pactum*. But where the Consideration is executory, that may be traversed; for if that executory Act be not done by the Plaintiff, there is no Foundation for the Action. And therefore if the Defendant denies that Fact to be

Cro. Eliz. 201. Yelv. 171. Bulst. 16. Cro. Jac. 234. Latch 3.

be done, which the Plaintiff ought to have done to intitle himſelf to his Action, the Plaintiff's Action falls to the Ground, and therefore in an *Aſſumpſit*, where there is no Law-Wager, this will make a ſubſtantive Plea.

Another Plea in Debt on a ſimple Contract is, that the Defendant tendered the Money, and is ſtill ready to pay. This Plea is regularly bad after an Imparlance, by which the Defendant deſires Time to anſwer the Plaintiff's Demand, which ſhews that the Defendant was not always ready to pay the Plaintiff his Demand. The Benefit the Defendant has by this Plea, is to ſave Damages, which the Plaintiff would recover from him for the Detention of the Debt, for which Purpoſe there is always a ſpecial Requeſt to pay, laid in the Declaration, but notwithſtanding that, the Defendant may plead that he was always ready, and prays Judgment of the Damages; but in *Aſſumpſit*, if the Defendant pleads that he was always ready, he muſt demand Judgment of further Damages: For in Debt no Damages are recovered but only for the Detention. And the Form of this Plea is thus: *And the ſaid Defendant comes, &c. and ſays that he always from the ſaid Feaſt Day unto this preſent Time was ready, and ſtill is ready to pay to the ſaid* A. *the ſaid Sum of ten Pounds, and this he is ready to verify, and brings the ſame here into Court ready to be paid.* And the Plaintiff on this Plea may recover the Money in Court; and if the Plea be falſe, that is, if the Plaintiff had really reco-

2 Salk. 622. Comb. 444. Carth. 413. 12 Mod. 152. 3 Salk. 343. Ld. Raym. 254.

2 Salk. 623.

Raſt. Ent. 159.

recovered the Money after it became due, and the Defendant did not pay it after that Demand, he may reply for his Damages in this Manner: *And upon this the ſaid* A. *here in Court recovered the ſaid ten Pounds from the Defendant, therefore the Defendant is quit thereof, &c. But the ſaid* A. *for his Damages which he ought to have on Occaſion of the Detention of the ſaid ten Pounds, ſays that he, the ſaid Day and Year aforeſaid, at* ——— *aforeſaid, and after the Feaſt aforeſaid, requeſted the ſaid Defendant to pay him the ſaid* A. *the ſaid ten Pounds, which the ſaid* A. *intirely refuſed to pay, and this he is ready to verify, wherefore he prays Judgment and his Damages to be adjudged to him on Occaſion of the Detention of the ſaid ten Pounds.* The Form of the Rejoinder, and the Iſſue thereon joined is in *Raſtal.*

Danv. Abr. 507. (C) pl. 2.

If *A.* ſells Lands to *B.* for a certain Sum of Money; in an Action of Debt for the Money, it is no Plea in Bar that the Lands are evicted. But if *A.* poſſeſſed of a Ward, had ſold it to *B.* and before the Day of Payment the Ward was evicted, if *A.* ſhould bring an Action of Debt for the Money, it would be a good Bar, that the Ward was evicted by a Stranger. And the Reaſon of the Difference is this; that in the Caſe of Land there is a Tranſmutation of the Poſſeſſion, and the Title is paſſed by the Conveyance, which is peruſed by Counſel, and if there were any Defects in the Title, there are proper Covenants in the Conveyance to ſecure the Purchaſer, on which he muſt take his Remedy; and the Purchaſe Money

Money becomes a Debt on the Conveyance in all Events; and if the Money was paid, the Purchaſer could never bring it back again, upon the Eviction of the Land; and for the ſame Reaſon, where the Money is not paid on the Purchaſe, it remains a Debt after the Eviction of the Land. But in Caſe of the Ward there is no Title dereigned, and a Man does not ſell his Ward, that is the Man or Woman, but the Property he has in them, and therefore if the Ward be evicted and the Money paid, it is ſo much received by the Vendor to the Vendee's Uſe: And ſo if it is ſued for by the Vendor, where the Vendee has not paid it, the Vendee may plead the Eviction in Bar. *Quære* however, for it ſeems if Goods are ſold, and evicted from the Vendee, that the Vendor has ſtill his Action of Debt for the Money, upon the Contract, and the Eviction would be no Plea to the Action. Bro. 231. pl. 165.

BOOK

BOOK the THIRD,

CHAPTER the SECOND.

Of the Pleas and Iſſues in the Action of Debt for Rent.

And firſt, Of the general Iſſue Nil debet, and what may be given in Evidence thereon.

IT ſeems by the antient Books, that they took the General Iſſue to be *Non demiſit* upon an Action of Debt on a Leaſe; and *Nil debet* as to the Rent ariſing on the Leaſe. But this was when Leaſes for Years were ſubject to the Power of the Freeholders, and were of a ſhort Continuance, and generally by *Parol.* Afterwards, when the Statute of the twenty-firſt of *Henry* the Eighth took Leaſes for Years out of the Hands of the Freeholders, by giving Leave to the Leſſee to falſify the Freeholder's Recovery, then *Nil debet* began to be the General Iſſue. This Plea traverſes the Leaſe as well as the Debt, for if

Mod. 35, 118. Sid. 151. 2 Lev. 10. Goldſb. 80. Leon. 110. Vent. 29. 5 Mod. 18. Lev. 104. Keb. 555. Tri. per Pais 177. Cro. Car. 21. Cro. Eliz. 101, 145. Cro. Jac. 503. 2 Saund. 78, 79. Sid. 456. Keb. 536, 596, 625. See Ld. Rym. 38.

there

there was no Leaſe, there could be no Debt. From hence it was, that they formerly held that the Entry and Expulſion of the Plaintiff himſelf, or the Eviction or Entry of a Stranger, could not be given in Evidence; for the Plea admits the Demiſe and avoids it, and therefore could not be given in Evidence upon the Iſſue of *Non demiſit*, but when the General Iſſue in Debt for Rent came to be *Nil debet*, then the Entry and Expulſion of the Plaintiff himſelf, or the Eviction of a Stranger, was allowed to be given in Evidence on the General Iſſue of *Nil debet*: For though that Iſſue does confeſs and avoid the Demiſe, yet it does not confeſs and avoid the Debt, but is in the Negative as to the Debt, and by Conſequence it is proper to give in Evidence on the Iſſue of *Nil debet*, that there was no ſuch Debt.

But if the Leſſor quits the Poſſeſſion, and leaves it vacant for the Leſſee, if the Leſſee does not enter he is anſwerable for the Rent; becauſe the Poſſeſſion in Law is in him, and he contracts by his Leaſe to enter and pay the Rent. Rol. Abr. 605. Dy. 14. pl. 10.

But here it is to be obſerved, that an Entry of a Leſſor which ſuſpends the Rent, muſt be a tortious Entry. For if the Leſſee redemiſes Part to the Leſſor, or lets Part to *A.* who aſſigns to the Leſſor, this is no Entry to ſuſpend the Rent; and therefore cannot be pleaded in Bar or given in Evidence on *Nil debet*. For the Reaſon why a tortious Entry by the Leſſor ſuſpends the whole Rent is, becauſe the Rent by the original Contract is payable out of, Suſpenſion.

of, and as a Retribution for, the whole demiſed Premiſſes, and therefore when the Leſſor makes a tortious Entry into Part of the Land, the Leſſee ſhall pay nothing for the Reſidue; the Leſſor not ſuffering the Leſſee to enjoy that for which the Rent was payable by the Contract. But where the Leſſee leaſes Part to *A.* who aſſigns to the Leſſor, there the whole Rent is not payable out of the firſt Leaſe, becauſe the Leſſee by the Leaſe to *A.* of Part has aſcertained the Value of that Part.

Apportionment. As to the Apportionment of the Rent, there is a Difference when the Leſſor claims Part under *A.* and where he claims immediately by a Re-demiſe of the Leaſe. For, in the firſt Caſe, if there was no Rent payable by *A.* the Leſſor ſhall have the Benefit of his Contract, and have his whole Rent from his Leſſee by the original Leaſe. But if the Leſſee re-demiſes Part and reſerves no Rent, there ſhall be an Apportionment. But if there was a Rent reſerved on the Re-demiſe, there ſhall be no Apportionment, becauſe by the Reſervation on the Re-demiſe the Parties themſelves have aſcertained what Rent ſhall be allowed for that Part; and therefore it is common on the Iſſue of *Nil debet*, where the Leſſee gives in Evidence that the Leſſor entered on Part, to anſwer that he entered by a Leaſe from the Leſſee; otherwiſe, if a Man leaſed his Houſe, and afterwards took a Room in it for Lodging, that would ſuſpend his whole Rent, which would be unreaſonable and abſurd. And here it is further to be obſerved, that if the Leſſor enters tortiouſly on the Leſſee, it is

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in the Election of the Leſſee whether he will enter again upon him or pay no Rent.

Another Matter to be obſerved is, that if the Re-entry of the Leſſor be by Virtue of a Clauſe in the Leaſe for Non-payment of Rent, the Leſſor in ſuch Caſe may bring his Action of Debt for the Rent incurred before the Re-entry made, by Virtue of ſuch Condition, for ſuch Re-entry was agreed to by the Leſſee himſelf on his Non-payment, and thereby becomes a legal and juſtifiable Act, and therefore cannot ſuſpend that Rent which ought to be paid as a Retribution for the Land for the Time the Tenant enjoyed it. And ſo it ſeems if the Re-entry of the Leſſor had been tortious, it could only ſuſpend the Rent due and payable after ſuch tortious Entry.

If *A.* leaſes to *B.* at ten Pounds a Year, and ſo from Year to Year ſo long as both Parties pleaſe, or during the Will of the Leſſor, which is the ſame Thing in Law: *B.* enjoys the firſt Year, and holds for Part of the ſecond Year, and before the End of the ſecond Year determines his Will by giving Notice of it to the Leſſor, and leaves the Land; in an Action of Debt brought by the Leſſor for this ſecond Year's Rent, it ſeems by the better Opinion that *B.* cannot plead this Notice, and that no Rent was in Arrear after ſuch Notice given; becauſe after *B.* had held Part of the ſecond Year, it was no more in *B.*'s Power to determine the Leaſe till the End of that Year, than it was in the Power of *A.* to turn him out

11 Mod. 203. 2 Salk. 414. See Winch 32. Anon. Lutw. 214, 215. Cro. Car. 275. Sid. 427. Mod. Rep. 3. Salk. 413. Godb. 129. Keilw. 65, 163. Mod. 372. Aleyn 4. 2 Jo. 5. Sid. 359. Holt 417.

out of the Land till the second Year was expired. And if it should be otherwise, it would then be in the Power of *B.* to hold and enjoy till the very last Day of the second Year and pay no Rent, because no Rent is due till the last Day of the Year.

So if a Man make a Lease to *B.* at a certain Rent, and upon Condition that if the Rent be not paid in so many Days after the Day on which the Rent is made payable by the Lease, that then *A.* shall re-enter; in this Case if *A.* re-enters for Non-payment, and then brings an Action for the Rent, the Defendant may plead *Nil debet*, but cannot plead *Riens in Arrear*, for that is not sufficient.

Keilway 153. b. Bro. Debt, pl. 83.

Saund. 208. In Debt for Rent the Plaintiff declared, that he let to the Defendant three Rooms and a Cellar at eight Pounds a Year payable at *Michaelmas* and *Lady-day*, and for half a Year's Rent due at *Michaelmas* he brought his Action. The defendant pleaded in Bar, that the Plaintiff did not only demise the said three Rooms and Cellar, but also one Room called a Dining-room at the said yearly Rent of eight Pounds a Year payable half-yearly; by Virtue of which Demise the Defendant entered into the Dining-room as well as the other Chambers and Cellar, and that the Plaintiff before *Michaelmas* entered into the Dining-room upon the Possession of the Defendant, and ousted him, and withheld the Possession from him. The Plaintiff demurred to this Plea and had Judgment. For the Defendant having pleaded a Demise different from what the Plaintiff had declared

Traverse.

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on, the Defendant ſhould have concluded his Plea with a Traverſe, that the Plaintiff demiſed him the three Rooms and the Cellar only; and though regularly there can be no Traverſe of a Negative, yet in this Caſe it is neceſſary in order to connect the Confeſſion and Avoidance of the Matters in Difference between the Parties, and therefore the Law admits it in this Caſe for the Neceſſity, becauſe the Avoidance in the Defendant's Plea does not go to any Matter mentioned in the Declaration, and therefore the Avoidance will not go to the Contract on which the Plaintiff declared, but with a Negative, that the Contract in the Declaration was not the Contract between them, and therefore this Traverſe is neceſſary to make it a material Avoidance, ſince the Confeſſion is not of the thing declared on, but of another Thing not mentioned in the Declaration, which cannot be connected without a Traverſe.

So if the Plaintiff declares upon a Leaſe of fourteen Acres, and the Defendant would plead in Abatement, that the Plaintiff let ten Acres to the Defendant and his Wife, he muſt conclude with a Traverſe, without that, that the Plaintiff let fourteen Acres to the Defendant, becauſe the Traverſe ſhews there was no other Leaſe between them but that ſet out by the Defendant; and therefore it is not proper to plead, that the Plaintiff let ten Acres to the Defendant and his Wife, but did not demiſe the other four Acres, becauſe as to the four Acres, that would be a Bar which could Bro. Debt. pl. 217. 17 Ed. 4.

not be mingled with the Plea in Abatement.

2 Mod. 264. 10 Mod. 38. In Debt for Rent reſerved upon a Leaſe for Years, with a Proviſo that if the Rent be behind and unpaid by the Space of a Month next after any of the Days of Payment, then the Leaſe to be void: The Defendant pleads 12 Mod 413. 414. that the Rent was unpaid a Month after the Day on which it was reſerved to be paid, and ſo the Leaſe became void. The Plaintiff demurred, becauſe the Defendant did not ſet forth in his Plea, that the Plaintiff demanded his Rent, and the Demurrer was allowed; becauſe an actual Demand of the Rent by the Plaintiff was neceſſary to determine the Leaſe.

Law of Evid. 3d Edit. 196. pl. 11. Gilb. Law of Evid. 160. Upon *Nil debet* the laſt Receipt is good Evidence that all the Rent before the Receipt is paid. This Conſtruction ariſes from the violent Preſumption, that no Man would diſcharge the laſt Gale where former Gales were due. Beſides, the Leſſee for Years was conſidered merely as a Bailiff or Accountant to the Leſſor, and therefore where the Leſſee has actually accounted for the laſt Gale, and taken a Receipt for it, it is preſumed all former Accounts have been ſettled, or elſe the Landlord would neither have continued the Receiver, nor have given him a Receipt. But if the Acquittance be under Seal it muſt be pleaded, Co. Litt. 373. a. Dyer 271. 3 Co. 65. Sid. 44. becauſe every Deed executed with legal Solemnities muſt be exhibited to the Court, and is not to be given in the firſt Inſtance in Evidence to a Jury.

And

And it may be obſerved, that in all Actions of Debt for Rent where the Defendant pleads *Nil debet*, he may put the Plaintiff on proving the Demiſe, and on a Deed poll or parol Leaſe, he may controvert the demiſing Power of the Plaintiff by ſhewing the Title in another. And that is the Meaning of the old Books which ſay, *Nil luy droit, il ne leſſa pas, il ne unque ſeiſie de la Terre.*

BOOK the THIRD,

CHAPTER the THIRD.

Of the Pleas of Nihil demiſit, Nil habuit in Tenementis, Non eſt factum, Riens paſſa par la fait, Non habuit nec occupavit, &c.

IF a Man declares upon an Indenture of Leaſe, the Defendant cannot plead *Nil habuit in Tenementis*, becauſe the Defendant by the Counterpart of the Indenture under his Hand and Seal has allowed the Leſſor's demiſing Power. So that if the Leſſor had demiſed the Leſſee's own Land to him by Indenture, the Leſſee would be eſtopped from

3 Lev. 146. Co. Litt. 47. b. Salk. 277.

claiming during the Term, or to refuſe Payment of the Rent during the Demiſe. Otherwiſe if the Demiſe had been by Deed Poll; becauſe the Leſſee by the Solemnities of contracting does not allow the Leſſor's demiſing Power.

Neither, if a Man declares for Rent upon an Indenture, can the Defendant plead *Non demiſit*, becauſe he has owned the Demiſe under his Hand and Seal, and therefore as long as that Demiſe by Indenture ſtands in Force, he cannot ſay that the Leſſor did not demiſe.

Neither in ſuch Caſe can the Defendant plead *Non eſt factum*, becauſe, tho' the Counterpart was not by his Deed, yet if the Leſſor demiſed the Land under that Rent, and the Leſſee entered, the Rent was a Debt, and conſequently the Traverſe of the Deed in this Caſe is not a ſubſtantive or deciſive Iſſue, becauſe though there was no ſuch Counter-part, yet there might have been ſuch a Demiſe as the Plaintiff declared on. And if the Defendant ſhould in ſuch Caſe plead *Non demiſit*, then the Eſtoppel of the Counter-part ſtands againſt him, becauſe the Iſſue of *Non demiſit* does not deny the Counter-part, and then there is an Eſtoppel againſt him; and the Defendant cannot traverſe the Demiſe and the Deed both, for then the Iſſue would be double. And a Man cannot plead *Non demiſit modo et formâ*, as he may *Non feoffavit modo et formâ*, where Feoffment is by Indenture; the Reaſon is becauſe the Demiſe is by Deed, but the Feoffment has its Force from the Livery, and

and therefore there is no Eſtoppel from the Deed to prevent a Traverſe of the Feoffment.

If a Man declares in Covenant for Non-payment of Rent on a Deed indented and inrolled, the Defendant cannot plead *Non eſt factum* to this Action of Covenant; becauſe the Deed, being inrolled, cannot be denied. But he may plead *Non tranſtulit in Poſſeſſionem*, or *Riens paſſe per le fait*. Becauſe if nothing paſſed to the Leſſee by the Deed, then no Rent could ariſe, and then the Covenant to pay Rent, which never became due, could not be obligatory.

If a Man pleads *Riens paſſe per le fait*, as in the Caſe of Inrolment, he can never give in Evidence, that the Deed was never ſealed and delivered; becauſe this Plea admits the Sealing and Delivery of the Deed and all the legal Solemnities, but denies that any Thing was effectual to paſs an Intereſt to the Defendant. But upon *Non eſt factum* you may give in Evidence that *Riens paſſe per la fait*, if it be ſuch Matter as makes it abſolutely a void Deed, as Coverture, not lettered, delivered as an Eſcrow, or the like, for a void Deed is as no Deed at all. But if it be ſuch Matter as makes the Deed only voidable, that is, ſuch Matter as when ſhewn may be avoided by Conſtruction of Law, there ſuch Matter cannot be given in Evidence on *Non eſt factum*, but muſt be ſhewn by Way of Plea to the Court. As for Inſtance, Infancy; becauſe there are ſome Deeds which bind Infants and ſome not, according as their

5 H. 7. 38. Bro. Gen Iſſ. 22, 25, 38, 79. Rol. Abr. 677.

Intereſt was advanced or injured by them; and therefore Infancy muſt be pleaded, that the Court may judge whether the Contract ought to be avoided or not.

Bro. pl. 88. Dyer 121. pl. 18. 122. pl. 23. Co. Litt. 47. b. 2 Rol. Abr. 780.

But upon a parol Leaſe or Deed poll of Land, *Non demiſit* is a good Plea; becauſe here no Eſtoppel is ſhewn to the Court why the Defendant cannot ſay the Leſſor did not demiſe, and therefore he may traverſe the Demiſe itſelf, it being a ſubſtantive Iſſue, which will make an End of the Plaintiff's Action: And every ſubſtantive Matter in the Declaration, though it muſt be proved on the general Iſſue, yet it may be traverſed a-part for the better aſcertaining the Proof, and attainting the Jury in Caſe of a falſe Verdict.

But if the Plaintiff declares on a Demiſe in general, and the Defendant pleads *Non demiſit*, the Plaintiff cannot give in Evidence a Deed indented, becauſe all Eſtoppels ought to be ſhewn to the Court, ſince the Solemnities of Contracting, and what makes an Eſtoppel is Matter of Law, and the Plaintiff cannot ſhew that to the Jury; which if it had been ſhewn to the Court in the Declaration had eſtopped the Defendant from taking ſuch Iſſue.

But if a Man demiſes Sheep at a certain yearly Rent, the Defendant cannot plead *Non dimiſit*. For this Demiſe is not a ſubſtantive Contract from whence the Rent ariſes, but is only the Loan of the Sheep for More for

which it is the Conſideration, and therefore the Plea of *Non demiſit* in this Caſe, would be only a Traverſe of one Part of the Contract; whereas the whole Contract ought to be traverſed; which can be done only by pleading *Nil debet per legem* or *per patriam*. Then the whole Contract is put in Iſſue. Beſides, in this Caſe the Defendant may wage his Law, and wherever he can wage his Law, he ſhall never plead the General Iſſue. Dyer 122. pl. 23.

There is a Difference between a local and a tranſitory Matter of Defence; a Man cannot now, when the Matter of the Defence is tranſitory, plead Payment, and conclude *iſſint riens luy droit*, or *Nil debet*, which is the general Iſſue. For though antiently one might have ſhewn Matter ſpecially as Inducement to a General Iſſue, as a Woman might have pleaded Coverture, *et iſſint non eſt factum*, ſo they antiently pleaded Payment, *et ſic nil debet*; but now Payment cannot be pleaded as a ſubſtantive Plea, becauſe it does not confeſs and avoid the Debt, but is only Evidence that nothing is due. And now *Nil debet* is pleaded, and Payment is given in Evidence. For the Payment is a tranſitory Matter, and may be given in Evidence in any Place. And theſe Matters were in antient Times ſhewn to the Court, rather to ſee the Opinion of the Court touching the Evidence of the Caſe, than as Pleas to be relied on to the Action. But where the Defendant pleads, *levied by Diſtreſs*, if the Action be brought in the ſame County where the Land lies, he muſt now co..clude *et ſic*

nil debet. Becauſe then it amounts to the General Iſſue, and the Levying by Diſtreſs is but Inducement to the General Iſſue. But if the Lands lie in another County than where the Action is brought, as it may be where the Leaſe is by Indenture, then the Defendant may plead *levied by Diſtreſs*, without concluding *et ſic nil debet.* But it muſt be pleaded with proper Time and Place, in order to be tried in its proper County, that is, in the County where the Diſtreſs was taken, and it muſt be ſhewn to the Court in order to be ſent to that County, and that the Court may be ſatisfied that there is ſufficient local Matter for that Purpoſe to take the Trial out of the County where the Plaintiff has laid his Action. But if the Defendant is willing to waive his Benefit of the Trial in that Place, where the local Matter ariſes, he may give it in Evidence on the General Iſſue of *Nil debet.*

Bro. Dette, pl. 13. Kelw. 153. So if the Defendant pleads *Riens in Arrear* without concluding *et iſſint nil debet*, this is not a good Plea, becauſe it amounts to the General Iſſue, and therefore he muſt take the Words of the General Iſſue.

In Debt for Rent againſt Tenant at Will, *Non habuit nec occupavit*, is a good Plea; becauſe if the Tenant at Will does not enter and enjoy the Premiſſes, it is a Determination of his Will, and ſo leaves no Foundation for an Action for the Rent. For this being a Confeſſion and Avoidance of the Leaſe at Will by ſhewing the Determination thereof, it may as well be pleaded to the Demiſe by Way of Confeſſion and Avoidance, as be given in Evi-

Doctr. placit. 109. Dyer 14. pl. 70. Kelw. 656.

dence

dence on the General Iſſue *Nil debet*, by Way of Negation of the Debt; becauſe if the Leſſee had no Intereſt no Debt would ariſe. But this is no good Plea to a *parol* Leaſe for Years, becauſe though it is a Confeſſion of the Leaſe, yet it is no Avoidance of the Debt, becauſe he does not ſhew to the Court any Thing that could prevent his Entry or Occupation; and he ought by his Contract to have entered and occupied, and therefore this Plea is no Avoidance without ſhewing an Obſtacle to ſuch Entry and Occupation.

In Debt for Rent, it is no good Plea for the Defendant to ſay, that he was ready to pay it at the Day and Place, and has been ſo ever ſince, though he makes a Profer of the Rent in Court, unleſs he ſays, *Quod obtulit* to pay it at the Day, or unleſs he ſays that he was ready at the Day and Place to pay it, and the Leſſor did not come to receive it. For in the Caſe reported in *Ventris*, the Tender was neceſſary to the Plea, becauſe the Defendant did not in his Plea ſay, that the Leſſor was there ready to receive it. For if the Leſſor was there to receive it, as for any Thing appearing in the Plea he was, it is not ſufficient for the Leſſee to ſay he was there ready to pay it, unleſs he makes an actual Tender. For he muſt make a Tender to excuſe him from Damages for the Detention. But in the Caſe reported by *Raymond*, the Leſſee did all he could, for he could not make a Tender when the Leſſor was not there to receive it. Vent. 322. 2 Lev. 209. 3 Keb. 800, 810, 828. Raym. 418.

If

If a Man declares for Rent, upon a Deed indented, and the Leſſor covenants to repair, there if the Leſſee lays out any Part of the Rent in Repairs, he muſt plead the Leſſor's Covenant to repair, and that he laid out the Rent in Purſuance of the Covenant, but cannot give the Covenant in Evidence on the General Iſſue; becauſe this being a Diſcharge by a Counter-Agreement under Seal, the Solemnities of contracting muſt be ſhewn by a legal *Profert* of ſuch Covenants before they can deſcend to Iſſue. And this muſt be pleaded as well where the Leſſor covenants to repair, as where he covenants that the Leſſee ſhall repair out of the Rents. For in the firſt Caſe if the Leſſor do not repair, the Leſſee may do it in Preſervation of his own Eſtate.

Leon. 237. Cro. Eliz. 222. Bro. pl. Dette 72. Doctrina placit. 109.

But if the Leſſor declares upon a *Parol* Leaſe, and he appoints that the Leſſee ſhall repair the Houſes; this Command of the Leſſor's cannot be pleaded in Bar of the Rent, but on the General Iſſue it is an Evidence of the Payment of the Rent; becauſe it is no Matter of Law but of Fact merely, how far it ſhall be Evidence of ſo much Money laid out by the Leſſee on the Plaintiff's Directions for his Uſe.

Doctrina placit. 199. Fitz. pl. 65.

But if the Leſſor declares upon a Deed indented, and there be no Covenant in the Deed that the Leſſor ſhall repair, there the Leſſee being obliged by Leaſe to repair, the Command of the Leſſor that the Leſſee ſhall repair out of his Rent will be no Evidence of the Payment of the Rent on the General Iſſue againſt

Fitz. placit. 65. 12 H. 8. 1. 14 H. 4. 27.

againſt the Deed: But in the Caſe of a *Parol* Leaſe the Command of the Leſſor to repair out of the Rents is an Evidence, that by the original Agreement the Leſſor was to repair.

But if the Leſſor is bound by Deed indented to put Houſes in repair, there if they are ſo ruinous that the Leſſee cannot enter, the Leſſee may repair out of the Rents, and plead the ſame in Bar: But he cannot diſcharge his not entring for Want of ſuch Repair; becauſe he has it in his Power to repair out of his Rent, and he contracts for his Entry and Occupation by Acceptance of his Demiſe. 27 H. 6. 10. Fitz. pl. 242, 47.

If the Leſſee has a Releaſe under Seal of the Rent, he muſt plead it in Bar, becauſe all legal Solemnities muſt be ſhewn to the Court, but if the Leſſor agrees that a Debt due from the Leſſor to the Leſſee ſhould go in Satisfaction of the Rent, that cannot be pleaded, but is an Evidence of Payment on the General Iſſue. Dyer 28. 12 H. 8. 1.

So if the Leſſee pays the Rent to the Grantee of a Rent-Charge, by the Direction of the Leſſor, this is Evidence of the Payment, but cannot be pleaded in Bar, ſince it amounts to the General Iſſue.

BOOK

BOOK the THIRD,

CHAPTER the FOURTH.

The laſt Thing to be treated of under this Head is the Pleas to the Action of Debt, grounded upon Judgments or other Records.

2 Saund. 344. AND here in the firſt place it is plain that the Defendant cannot plead *Nil debet*, becauſe the Judgment is the moſt concluſive Evidence that can be of the Debt being due, and therefore no Plea can be good that denies the Debt or Record. But if there be no ſuch Record as the Plaintiff has declared on, the Defendant muſt plead *Nul tiel Record*; which Iſſue is tried by producing the Record itſelf, if it be a Record of that Court where the Action is brought; but if it be a Record of another Court, then it is to be *certified* unto the Court where the Action is depending; and if there be a Variance between the Record declared on and the Record produced or certified, the Plaintiff fails in his Proof.

Thus

Thus in Debt upon a Recognizance of Bail in the King's Bench taken in the Common Pleas, the Plaintiff declares upon a Recognizance taken before the Chief Justice and his Companions in Court, the Defendant pleads no such Record, and the Recognizance certified was taken before one of the Judges at his Chambers. The Court held the Plaintiff had failed of his Record, for that a Recognizance taken in Court and one taken before a Judge at his Chambers were variant. But in the King's Bench they enter all Recognizances taken at the Judges Chambers as taken in Court. The Practice is different in the Common Pleas.

2 Salk. 56, 659. 3 Danv. Abr. 314. pl. 6. 6 Mod. 42, 132, 612. 2 Ld. Raym. 966. See 11 Mod. 224. Ld. Raym. 152, 536, 697, 702, 715.

If *A.* recovers either Debt or Damages againſt *B.* and ſues forth a *Scire facias*, and the Sheriff levies the Debt, but does not pay it into Court, or to *A.* and *A.* brings an Action of Debt on the Judgment, *B.* may plead that the Plaintiff ſued a *Fieri facias* to the Sheriff who levied the Debt and paid it to *A.* for the Debt is of Record, and the Levying it by an Officer of Authority is of Record alſo and is good, and the Defendant cannot compel the Sheriff to pay the Money ſo levied into Court or to the Plaintiff, and therefore in no Kind of Fault. It would be unreaſonable that ſuch a Plea in this Caſe ſhould be held ill, and the Defendant be compelled to pay the Money over again, and to be obliged to ſue the Sheriff for the Money levied by him. Nothing is more abhorrent to Equity and Juſtice than Circuity of Action. And in this Caſe it would be

Bro. Debt, pl. 63. Execution, pl. 35.

be the more unjuſtifiable, becauſe the Defendant had ſubmitted to the Commands of the Court and had done every Thing which lay in his Power, and the only wrong Doer was the public Officer, who was accountable to the Court for every Thing he did in this Matter.

ON THE CONSTITUTION OF ENGLAND.

OF THE DIVISION OF THE COURTS.

TO underſtand the Conſtitution of *England*, we muſt conſider it under a fourfold Period.

Firſt, At the coming in of the firſt *Saxons* before they were civilized, which was in Clans and Troops, and is already deſcribed in the Hiſtory of the *Feuds*.

Secondly, Their Erection into a firm State or Kingdom, under *Alfred*.

Thirdly, The great Alteration at the Conqueſt.

Fourthly, The preſent Scheme and Eſtabliſhment of the Law, begun by *Edward* the Firſt.

We ſhall begin with the Second, *viz.* their Erection into a firm State or Kingdom, after *Alfred*.

The main Order of Government, by which *Alfred* civilized the *Engliſh*, was making the Men of the ſeveral Clans Compurgators of each other, whereby each Clan was turned into a Decennary, and the Manner of doing it was thus:

He took from the People the Power of electing a Thane, and appointed them himſelf, and according as the People of the ſame Manors co-habited together, he divided them into Shires; over every Shire was the Earl which was the proper Thaniſt of the Clan. For by the *Breban* Law the *Caput comitatûs* was the Eldeſt and moſt worthy; the Earl of the County and his Shire Reeve was to array all the ſeveral Perſons within his Shire, and therefore the Perambulation was through the County twice every Year, in which the Shire Reeve made this civil Array of all the Men in the County, which was uſually done after *Michaelmas* and *Lady-day*; if any Perſon was found that had no Compurgators he was put into Priſon till he could obtain ſome Decennary to admit him. The Earl or Sheriff on theſe Law-Days were uſed to give in Charge the ſeveral Articles of the Crown-Law, and if any Perſon was guilty of the Breach of any of them, he was delivered up by his Compurgators, ſo that the *Saxon* Law conſiſted of the ſeveral Articles that were given in Charge at the ſeveral Torns, and the Kings at their ſeveral Acceſſions publiſhed by Proclamation their ſeveral Laws, as appears by *Lambert's Saxon* Laws, under the reſpective *Saxon* Kings.

Where

Where there were ſeveral Clans in one Shire, the Earldom was placed in the Perſon who had the greateſt Clan in Number and Riches; but if there were other leſs Clans not under the ſame Head or Confiny, they were divided into *Satrapias* or Hundreds, and the Lord of ſuch *Satrapia* or Hundred arrayed his own Men, which were therefore Leets, and ſaid to be taken out of the Torns, and in this Array the Articles were given in Charge as at the Torn.

In Boroughs, where there were great Numbers of Men in walled Towns, they were arrayed by the Confinies and Heads of the Clan within the Town, and therefore every Ward had its proper Alderman, who were choſen and not impoſed by the Prince.

In every *Decema* there was a *Præpoſitus* or Conſtable choſen in the Torn and reſpective Leets, who was Head of the Decennary during the Year; theſe were thoſe that had the Staff, and therefore ſometimes called Borſholders and Tything-Men and Head-boroughs at the Head of the Decennary.

Theſe in the County at large were choſen in the Torn before the Earl or Sheriff, and in the Leet before the Lord or his Steward; in the Boroughs they were choſen before the Aldermen in their proper Ward, which was called the *Wardmote*, and the Aldermen did themſelves annually chuſe their Head or *Præpoſitus*, becauſe, being ſeveral in their reſpective Wards, it was neceſſary that there ſhould

be one Head in each Townſhip, and therefore there was an annual Magiſtrate among the Aldermen who made up one *Decenna* in each Town, and their *Præpoſitus* was the Conſtable or Head of ſuch *Decenna*; the Laws were made at *Whittingham Motes*, which were a general Court of the whole Kingdom, as the Torns were of the Counties.

The Torns were the *Folk-Motes*, and to them were ſummoned all the Decennaries of Counties, unleſs in Leets to which they ſummoned the Boroughs of the reſpective Counties.

To the *Whittingham Mote* were ſummoned the Earls of each County, and the Lords of each Leet, and likewiſe Repreſentatives of the Townſhip, who were choſen by the Burghers of the Town, and they appeared in the King's ——— out of his own Court the *Whittingham Motes* met once a Year at the leaſt, and generally twice, *viz.* about *Eaſter* and *Michaelmas*.

This Law of the Decennary continued ſome Time after *William* the Conqueror came over, and there is a Shadow of it till this Day, for when the People grew numerous, it was impoſſible to put every Man into a Decennary, and therefore on the leaſt Offence given they made them find Sureties, which by the *Saxon* Law were previouſly found. So where any Perſon was charged with a Debt, he might purge himſelf by his proper Sureties, which was the Original of the Law-Wager.

The

The Torn perambulated twice every Year through each Hundred, unleſs there was a Leet from whence the Sheriff was excluded; twelve Men were impannelled to inquire of all Offences, ſo that the whole Inqueſt might not come from one *Decenna*, and it ſeems that if any Perſon was preſented by the Jury of his Hundred, he was to purge himſelf by *Ordeal*, in the Room of which the Petit Jury was ſubſtituted after the Conqueſt. If there was Favour or Affection ſhewn by the Sheriff or the Steward, there was an Appeal to the King's Court, and it appears by the *Mirrour* that *Alfred* animadverted very ſeverely on the Judges of Courts that had been guilty of Injuſtice.

The Alteration of the Law upon the Conqueſt.

WHEN the Conqueror came in, every Perſon found in Arms againſt him forfeited his whole Eſtate, in which he placed his *Normans*, and he compelled all thoſe who were not in Arms againſt him, to take out Patents of their Lands to hold of himſelf; in order to this he made a general Survey of the whole Kingdom, which was called *Domeſday*, and from hence it is, that we have ſuch an Innovation of the Law in this Period. And whereas the *Saxon* Property was either *Allodio*, which the Civilians call *In ſolido*, and deſcended to all their Children and Collaterals, and was by them called *Bockland*, and was held by Charters, which was originally invented by

the Clergy in ſecuring Lands to their Monaſteries; or elſe *Folkland* which are Eſtates for Life at moſt, and was held by Vaſſals from the great Lords by certain Services or Works; or elſe were Earldoms of Counties, which were held of the King without ſpecial Charter, for the gathering in of his Profits and Adminiſtration of Juſtice, and were generally for Life, unleſs forfeited for Miſdemeanor, and often granted to Children where the Anceſtor was meritorious.

All theſe the Conqueror made feudal, and to hold of himſelf hereditarily generally by Knight's Service, which had the Fruits of Wardſhips, Marriage and Reliefs, that he might keep up the Dependance on *himſelf*.

Where a Townſhip had Lands, and ſubſiſted before with a Provoſt or Mayor, as the City of *London* and *Cinque Ports*, there the Conqueror gave to ſuch and their Succeſſors, by the Tenure of contributing a reaſonable Tribute towards the Wars.

He alſo confirmed to the Monaſteries, and to the Biſhops, Lands either in *Frankalmoine* or *per Baroniam*, according as the Charter runs.

From hence it was, that all Lands were held mediately or immediately of the King, becauſe every Body was obliged to paſs Patents for their Eſtates, and this the Conqueror made to be held by Fealty, that even the Property of their Eſtates might depend upon their Allegiance

legiance to him. This prevailed every where ſave only in *Kent*, where amongſt other Cuſtoms they had that of *The Father to the Bough and the Son to the Plough*, which firſt extended to ſave them from all Forfeitures, but afterwards was conſtrued to extend to Felony only; and theſe Privileges were allowed to the *Kentiſh* Men by the Grant of *William* the Conqueror; whether they oppoſed him, and made this an Article of their Submiſſion, or whether it was an Act of Grace obtained by *Lanfranc* Archbiſhop of *Canterbury*, and *Odo* Biſhop of *Bayeux*, who were ſettled in *Kent*, is uncertain.

Thoſe that held immediately from the King were called his Head Tenants, or Tenants *in Capite*, as holding from the Head of the Government, and they gave out under Charters to their Vaſſals, and they took Fealty and had the feudal Fruits of their Vaſſals, but ſtill they were under Subjection to the King, and upon any Treaſon committed the Feuds were forfeited to the King, and not to the Lords, becauſe they ought not to receive any into their Lands but what were faithful to the King.

In the Courts he altered the Manner of Proceeding, for in the *Saxon* Times in the *Whittingham Mote* all Matters both Civil and Criminal were then debated, as likewiſe the Revenue; but for civil Matters and criminal, they were only a Court in the firſt Inſtance for Facts ariſing within the County where they ſat, but by Way of Appeal from the Injuſtice

of other Officers, they heard Cauſes from all the Countries. But *William* the Conqueror only cauſed the States to recognize him, and had not theſe annual Parliaments, fearing that, being all *Engliſh*, they might prove dangerous; but he eſtabliſhed a conſtant Court in his own Hall, made up of the Officers of his Palace, and they tranſacted the Buſineſs both criminal and civil, and likewiſe the Matters of the Revenue: And as they ſat in the Hall they were a Court criminal, and when up the Stairs a Court of Revenue. The civil Pleas they heard in either Court.

See the antient Dialogue of the Exchequer throughout for the curious Learning on this Subject.

Theſe Courts conſiſted of the Juſticiar, that was in Nature of the Preſident, and called *Capitalis juſticiarius totius Angliæ*. It was he who chiefly determined all Pleas, and with him ſat the Chancellor the Treaſurer Conſtable, and Marſhal, Seneſchal and the Chamberlains.

No Cauſe of Conſequence was determined without the King's Writ, for even in the County Courts, if the Debt was above forty Shillings, there iſſued a *Juſticies* to the Sheriff, to enable him to hold ſuch Plea, where the Suitors are judges of the Law and Fact.

So likewiſe the Writ of Right is ſued out, to enable the Lord to hold Plea of Land within his Juriſdiction, for it grew a Maxim among the *Normans*, that no one could hold Lands without the King's Patent, nor Plea above 40*s.* without the King's Writ.

Theſe

Theſe Writs were teſted by the *Juſticiar*, and generally returnable into the King's Court, and wherever the Court ſat, either *in aula Regis*, where they ſat on the criminal Side, or in the Revenue, which was above Stairs, if the Writ was returnable at either of theſe Sittings, as the Party appeared they proceeded to hear the Cauſe and give their Judgment; and the civil Proceedings were minuted by the Officers either attending in the criminal Court or in the Revenue; ſo that civil Pleas are formed both in the Sovereign Eyre of the King and in the Exchequer.

Though both the civil and criminal Buſineſs was diſpatched by theſe Officers, yet they had ſome Buſineſs that was peculiar to each of them. The *Juſticiar* preſided in the Court, and therefore called *Capitalis*, as the Head. All Patents were formed by the Chancellor, and the Seal put to them, and he had the Cuſtody of the Seal of the Court both for Writs and Patents. All Manner of Accounts were chiefly audited by the Treaſurer, and therefore in his Office the great Roll, now called the *Pipe Roll*, was made up, and was a Rent-Roll of the King's whole Eſtate; from whence they ſent Extracts, now called the Summons of the Pipe, to each Sheriff who was his Bailiff in each County, to gather his Revenue, and the Sheriff came in and accounted at *Michaelmas* and *Eaſter*, and brought in the Money from each Bailiwick. The Sheriff let the King's Demeſnes, and likewiſe gathered his Rents and Fines, all but the Wardſhip and Eſcheats which belonged to the Eſcheator, a proper Officer

Officer appointed for that Purpoſe in every County.

The Sheriff likewiſe accounted for the Profits of his Torns, Hundred Courts and Wapentakes, and ſometimes they farmed them at a certain Rent from the Crown.

To the Conſtable and Marſhal chiefly belonged the Care of Matters of Honour and War and Peace, and therefore all foreign Facts committed by the King's Subjects, were referred to them to determine according to the Law of Nations and of Arms.

From the beginning of the holy War, which was ſoon after the Conqueſt, there was a Common Law of Nations and Arms that went through all Chriſtendom, and the Honour of Knighthood was univerſal. So likewiſe in *Richard* the Firſt's Time the Laws of *Oleron*, tranſcribed with ſome Variation from the *Lex Rhodia*, were brought into this Kingdom.

The Common Law of Arms and Nations was ſuppoſed to be beſt known to the Conſtable and Marſhal, as attending the King's Armies, and therefore theſe Matters were referred to them.

The Quarrels and Diſputes between the King's menial Servants were determined by the Seneſchal and Marſhal.

The

The Marſhal was alſo to keep the Priſoners, and take Care that no Indecency was committed in the King's Houſe.

The Chamberlains were to count the King's Money, as it came in and iſſued out of the Treaſury.

The King's Sovereign *Eyre* or Court removed with the King wherever he went, and wherever he went the Torn in that County ceaſed.

On coming into any County, all Matters depending in the Torn were brought into the *Eyre*, and when there, the Record was never afterwards parted with, but becauſe the *Eyre* was only Ambulatory in the County where the King removed, they found it neceſſary that there ſhould be *Eyres* that ſhould go the Circuits through the ſeveral Counties in *England*, and thoſe in their Circuits ſuperſeded the Torn wherever they came, and tranſacted all Manner of civil and criminal Buſineſs.

They went the Circuits from ſeven Years to ſeven Years, and thus the Juſtice of the Nation ſtood ſtill till about the Time of the Barons Wars.

When the Court received any Plea, if it were a Matter of Fact, it was tried by a Jury of the County impanelled before the *Juſticiar*, or by the Law-Wager in Debts upon a ſimple Contract, for they thought that if the Plaintiff truſted to the Honeſty of the Defendant in lending him his Money without Specialty,

Specialty, he ought to truſt his Conſcience in the Diſcharge, but, if it was denied, then the Witneſſes were joined with the Jury to atteſt the Truth of the Deed. This was according to the feudal Inſtitution, the *Pares Curtis* ſigned the Inveſtiture, and wherever it was queſtioned atteſted it. And therefore in all Pleas of Land the Method was, to produce the Inveſtiture ſigned by the *Pares Curtis*, but where the Inveſtiture could not be found, they joined Iſſue by Battel, and therefore on the Writ of Right, which was after the *Saxon* Form, the Defendant had his Choice to try it either by a Jury or a Battel, but becauſe the Battel was of uncertain Event, the Aſſizes were afterwards invented.

The Battel ſeems to be a very uncertain Way of trying Property, and therefore it was in the Defendant's Choice who was in Poſſeſſion, whether he would try it in that Manner or not, and where he could produce his Inveſtiture, he was ſure to prevail *Coram paribus*; and if any Perſon was got into Poſſeſſion by forcible Diſſeiſins, they removed ſuch Treſpaſs in the Torn by an Inquiſition, that ſo he who had *Jus poſſeſſionis* might defend his Title in the Action: But becauſe the Trial was to be *Per pares*, the Sovereign *Eyre* never took Conuzance of Cauſes out of the Counties, and therefore it was neceſſary to ſend Juſtices in *Eyre* that the Cauſes in each County might be tried; if they did take Conuzance of Cauſes out of the County where the Court ſat, they were forced to ſend Inquiſitions to Sheriffs, and afterwards to Juſtices in *Eyre*, to try the Fact,

Fact, and afterwards to ſend it into the King's Court.

On the criminal Side Crimes were preſented on Articles of Enquiry, as in the *Saxon* Times, but they did not on ſuch Preſentments put them to their *Ordeal*, but introduced a Petit Jury in the ſtead to try the Priſoner, and therefore the Priſoners did not uſe to produce their Evidence to the firſt Jury, as they had formerly done, when they were put to their *Ordeals*.

From thence they only gave the Grand Jury ſuch Evidence as was ſufficient to accuſe; this was a great Reformation of the Law; for in the *Saxon* Times the greater Offences were tried by the *Ordeal*, and the leſs by Compurgators, both of which were ſufficient Methods of determining Cauſes, and therefore the changing this into a Petit Jury was of great Advantage. When theſe Judges in *Eyre itinerant* returned, they lodged their Records in the King's Court of Exchequer, many of which ſtill remain: And for the Fines and Amerciaments which were in ſuch Courts Proceſs went from the Exchequer, and therefore on the Diviſion of the Courts the Records of the Fines and Amerciaments were kept in the ſeveral Courts, and only Extracts out of them were tranſmitted into the Exchequer.

But the Juſtices in *Eyre* had a larger Authority than any of the other Courts, for when the Cauſe concerned the Kings Revenue,

tiue, they could give Day into the King's Sovereign Courts, ſo that the *Juſticiarii Itinerantes* were ſuppoſed to communicate with the *Juſticiarii Reſidentes*, and to ſupply their Places in all the Counties where the Sovereign *Eyre* was not.

As the Torn was ambulatory through the whole County, ſo the King's Court originally perambulated through the whole Kingdom, and after the Conqueſt, when the King diſcontinued the Method of making their Circuits through the whole Kingdom, they then appointed Juſtices in *Eyre* who went in their Stead with a delegated Power, but were always eſteemed Part of the King's Court exerciſing their Juriſdiction within the Counties; but being no more than a delegated Power there was ſtill a Writ of Error from them before the King himſelf, and in the Palace of *Weſtminſter*, where was the Seat of his chief Reſidence, there were reſidentiary Juſtices that heard and determined in the King's Abſence, but there were often Commands given to bring ſuch Plea before the King.

The Juſtices in *Eyre* had ſeveral Articles which they gave in Charge and proceeded upon, and all Lords of Liberties came the firſt Day and made their Claims, that they might hold Pleas within their Franchiſe at the ſame Time, and that the Juriſdiction of the *Eyre* might appear, and when the Charters were loſt, theſe Claims were allowed as Evidence of their Franchiſe.

The

The Marſhal (as has been ſaid) being to take Care of the Priſoners, did attend the King's Court, but when the Juſtices became Stationary, there was likewiſe a ſtationary Priſon, which they called the *Fleet*.

The preſent Scheme and Eſtabliſhment of the Laws begun by Edward *the Firſt.*

THE *Juſticiar* of *England*'s Power was that which united the King's Court under one Head, and being ſo great an Officer he was dangerous to the Government, and obnoxious to the Baronage towards the End of the former Period.

Jeffry Peterſon made *Juſticiar* 9 *Richard*, and continued till 15 *John*, got ſo great a Power that he became uneaſy to the Crown, ſo that King *John* from his Death ſwore he then began to be King of *England*, and tho' there were two *Juſticiars* afterwards in his Reign, they continued but for a ſhort Time, for *Peter d' Rocher* was not long in his Office, and being a *Portivin* was not grateful to the *Engliſh*, and as to *Hugo de Burgo* it is uncertain whether he was *Juſticiar* or not.

It plainly appears King *John* had a Deſign to lay aſide the Power, and therefore he readily granted an Article in the Grand Charter, that there ſhould be reſidentiary Juſtices, that the

the Common Pleas ſhould not follow his Court, but be held in ſome certain Place.

Johnſton's King John's Charter.

From hence there was an Eſtabliſhment of reſidentiary Juſtices, which was before in the Power of the Crown to conſtitute or not, and as ſome Antiquaries have held, that there had been reſidentiary Juſtices (as has been already mentioned) in the Time of *Richard* the *Firſt*.

Dugdale's Cronica Series 32.

Hence the Court broke out into three, *viz.* The Exchequer, for which he appointed certain Barons without a Chief, for he was created not according to *Dugdale*, 31 *Edw.* 1. but according to *Spelman*, *tempore Edwardi ſecundi*, and likewiſe *Juſticiars* who had all a Co-ordinate Power; the one was to do the Buſineſs of the Chamber, which was a Court of Revenue; the other tranſacted the Buſineſs of the Hall, which was an intire Court both civil and criminal, and which is the Reaſon why criminal Pleas are found among the Records in the Chief Pleas, they receiving till *Edward* the *Firſt* all Pleas as well criminal as civil, then there was an exact Diviſion.

There was likewiſe a third Court which was that of the Verge, held before the Seneſchal and Marſhal, and therefore *Fleta* mentions the Seneſchal as holding the Place of the *Juſticiar*, *Qui tam tenet locum Capitalis Juſticiarii Regis*, and they proceed without Plaint, without Writ, which was the Way the *Juſticiar* uſed to proceed, iſſuing out Precepts in his own Name and teſted by himſelf.

Spelman's Tit. Juſtic' ——

The

The Reaſon why the Verge continued was, that it might be privileged from the Arreſt of all other Courts, that none of the King's Officers might be taken up; and that Privilege continued before and after the King's Bench was ſettled. During the Minority of *Henry* the Third there were two *Juſticiars* appointed, *viz. Simon de Pallifhall* and *William* Earl of *Pembroke*; but when *Henry* the Third was of age he conſtituted *Hugo de Burgo* his Preceptor Grand *Juſticiar*, and gave him many great Employments; it was he who perſuaded him not to confirm the Charter, and it is very probable one of the Reaſons was, becauſe the Charter lopt off one of his great Profits, *viz.* the Common Pleas. So that the firm and full Eſtabliſhment of the Courts was not before the Reign of *Edward* the Firſt, and indeed the Chief Baron was not found out till *Edward* the Second, that being a Title that might have created Envy amongſt the Baronage, till he was known only to be a ſubordinate Officer of Juſtice.

The Court of the Verge continued with great Juriſdiction before the Diviſion of the criminal and civil Pleas in the two Benches; and *Fleta*, *ſecundo libro*, 3 *cap.* deſcribes the Juriſdiction of that Court before the Bench; for it mentions that the Aſſizes were all adjourned into this Court, and they might be adjourned from Day to Day, or out of that Court, if it removed to the next Aſſizes, which is contrary to the Nature of the King's Bench, which never parts with a Record of which it is once poſſeſſed. This Court took

Conuſance even of Robberies and Treſpaſſes committed within the Verge, though it were in foreign Kingdoms, which was the Reaſon of continuing this Court at the Erection of the King's Bench, becauſe ſuch Juriſdiction had been allowed in *France*, *viz.* in *Normandy*; on the Settlement of the Courts in King *Edward* the Firſt's Time, they took out all Pleas out of the Bench which was *Coram ipſo Rege ubicunque fuerit in Anglia.*

The Reaſon of taking them out of the King's Bench was, that *Magna Carta* had only made the Common Pleas reſidentiary, and therefore they would not extend it further, but the Common Pleas were removed there by Writ of Error; becauſe, Juſtice flowing from the King, his Juſtices Errors were rectified by himſelf: And, it is ſaid * that *Edward* the Firſt ſat in Court in Perſon, which ſeems to have been deſigned to give Countenance to that new Erection; nothing has been ſo much commended as to ſee Juſtice done in his own Preſence, the Chief Juſtice gave the Judgment, tho' the King was preſent, that ſo the King might not decide in his own Cauſe.

* *Henry* the Third ſat in Perſon with the Juſtices *in Banco Regis* on the Arraignment of *Peter de Rivallis*. *Speed* 521. At another Time the ſame King ſat there in Perſon, on the Arraignment of *Hubert* Earl of *Kent*. *Speed* 524. *Edward* the Fourth ſat there in Perſon. *Howe. Medul. Hiſt. Ang.* 131. *Richard* the Third ſat there in Perſon, and pronounced Pardon of all Offences committed againſt him. *Hew. Medul. Hiſt. Angl.* 136. and my Lord *Coke* ſays the Kings in former Times have perſonally ſat there. *Co. Lit.* 71. *b*.

From henceforth the King's Bench became the Sovereign *Eyre* in the County where it reſided, and in that Reſpect had the ſame Power

Power of the *Juſticiarius Angliæ*, and the Aſſizes in the County where the King's Bench was, were from that Time adjourned into the King's Bench, and not *Coram Mareſcallo*, as it had ſometimes been from the laying aſide the *Juſticiar* to the erecting this Court.

However the Marſhal's Court was continued, that the Squabbles of Servants might be determined before the Miniſter, and not before the King himſelf.

But amongſt theſe Alterations the Court of Exchequer retained the greateſt Similitude of the *Aula Regis*, for in this Place there were all the Officers of the King's Court continued in the ſame Employments, though not with the ſame Splendor; for the Court was compoſed of the ſeveral Barons who ſupplied the Place of the *Juſticiar*, though they were much lower in Degree; the Treaſurer had the whole Cuſtody of the Revenue; the Conſtable and Marſhal treated the foreign Treaties, and the Marſhal likewiſe was to keep the Priſoners; the Chamberlains were to receive and diſburſe the Monies, and the Steward diſpoſed of ſuch Sums as related to the Houſhold. See the antient Dialogue of the Exchequer.

The Pipe-Roll was the King's Rent-Roll, and the particular Profits of the County were farmed to the Sheriff, ſometimes for ſo much Money *Numero*, and ſometimes ſo much *Blank*; when it was ſo much *Numero*, it was to be paid in ſo much Money told; if *Blank*, it was ſo much in fine Silver after Combuſtion: For when the Money grew bad in the Exchequer, See the ſame Book.

they were uſed to try it in the Fire, and take the Quantity diſſolved that came out in Silver; and therefore at this Day whenever the Farmers pay 100*l. Blank*, there is a Shilling added to every Pound. So the 100*l. Blank* Farm is 105*l.* This called *Firma dealbata*, when a Farm was made *Blank*, from *Numero* it was termed *dealbare Firmam.*

We now come to treat of the four Courts as they are divided. And, firſt, of the Chancery intitled * the Court of Equity;—Secondly, of the † Common Pleas. Thirdly, the King's Bench, and fourthly the ‖ Exchequer.

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* Publiſhed under the Title of *Forum Romanum & Lex Prætoria.*

† Hiſtory and Practice of the Court of Common Pleas.

‖ Hiſtorical View of the Court of Exchequer.

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